DIALOGUE OF THE DEAF: A COMPARATIVE LEGISLATIVE ANALYSIS OF WEAK-FORM JUDICIAL REVIEW

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In contrast to the "monologue" of strong-form judicial review, weak-form judicial review creates a "dialogue" between the judicial and legislative branches which allegedly results in more holistic and democratically legitimate interpretations of constitutional and rights-based questions. For this dialogue, however, to have such results, the legislature needs to independently engage in thoughtful analysis on the issue. Otherwise, it is likely either blindly acquiescing to the judiciary or blindly imposing its will on the judiciary. Whether weak-form judicial review promotes such legislative engagement and fulfills its potential has not been thoroughly examined. This article will compare the level of legislative engagement in countries with weak- and strong-form judicial review to determine if weak-form judicial review results in improved legislative engagement that in turn promotes democratic dialogue. In so doing, case studies of legislative responses to judicial decisions will be presented from the United States, India, and the United Kingdom. The article concludes that legislative engagement should be one of the factors analyzed when assessing the benefits of weak-form judicial review and that legislative engagement might not occur in a sufficient quantity or quality in models of weak-form judicial review to result in the alleged dialogic benefits.

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I. INTRODUCTION

Please allow me to set the scene. You have just come home from a long day at work. You and your spouse had previously agreed that you would go out for a romantic dinner when you got home but you had not agreed on the restaurant. After you greet your spouse in the entryway, you begin a conversation. The conversation can go one of three ways.

Conversation 1

Spouse: "Hi honey, it is so great to see you. Where would you like to go for dinner tonight? I was thinking we could go to the new Indian restaurant that just opened in town."

You: "Oh, that is an interesting idea. But my stomach has been a little queasy today so maybe we can go somewhere else. How about Italian?"

Spouse: "I am so sorry to hear your stomach has been feeling queasy. We do not need to go to the Indian place. I am not really in the mood for Italian though; I had pasta for lunch. How about we go to the Tex-Mex place? That way you can get something easy on your stomach, but I can get something spicy!"

You: "Sounds like a plan."

Conversation 2

Spouse: "Hi honey, it is so great to see you. Where would you like to go for dinner tonight? I was thinking we could go to that new Indian restaurant that just opened in town."

You: "Oh, that is an interesting idea. But my stomach has been a little queasy today so maybe we can go somewhere else. How about Italian?"

Spouse: "No. We're going to the Indian restaurant."

You: "Ok."

Conversation 3

Spouse: "Hi honey, it is so great to see you. Where would you like to go for dinner tonight? I was thinking we could go to that new Indian restaurant that just opened in town."

You: "No, I want Italian because my stomach has been queasy."

Spouse: "Ok, whatever you say."

Which conversation sounds the most productive? In all conversations, there was dialogue. In the first conversation, however, there was a *meaningful* dialogue between the partners, and it was a more productive conversation. Both of their views were considered and the solution that was decided upon pleased both of them. In contrast, the dialogues in the second and third conversations were less meaningful because one partner's will was essentially imposed on the other. To reach the result of the first conversation, it is necessary for the spouse to actually analyze the situation and, at the very, least consider your concerns about the Indian restaurant. If the spouse does not even listen to you, as in Conversation Two, then you need not have spoken in the first place. Or, if the spouse is excessively complacent, as in Conversation Three, then your choice will be selected without there ever being a consideration of the spouse's possible preferences.

Now imagine that your spouse is the legislative branch of a government, you are the judicial branch, and instead of arguing over somewhere to eat, you are debating the constitutionality of a law. The spouse passes a law (the Indian restaurant), you consider it, find it unconstitutional (do not want spicy food), and pass your comments back to your spouse for final consideration. The spouse will then either (1) engage in thoughtful analysis and deliberation, taking into consideration your views on the matter, and make a final decision, or (2) fail to engage in thoughtful analysis and deliberation and simply make a final decision, either enforcing your or your spouse's preference. If such a dialogue is to be had between the branches of government when interpreting the constitutionality of a law, it seems essential to strive for a dialogue that is meaningful; otherwise, the dialogue does not serve its intended purpose.

Systems of weak-form judicial review generate a formal dialogue between the branches of government because once the judicial branch makes a constitutional interpretation, its interpretation is sent back to the legislative branch and the legislative branch can decide how to proceed.[2] Proponents of weak-form judicial review argue that weak-form judicial review is beneficial in part because it replaces the "monologue" of strong-form judicial review with a meaningful dialogue among the branches of government over constitutional or rights-based interpretation.[3] This dialogue allegedly increases the participation of the legislative branch in constitutional interpretation, thereby overcoming the alleged democratic deficiency of strong-form judicial review and results in rights being interpreted in a more holistic fashion.[4] Unfortunately, the effect of adopting a model of weak-form judicial review on legislative engagement with constitutional issues has not been thoroughly examined. Although there has been examination into legislative engagement in the United Kingdom (U.K.), a weak-form jurisdiction, a comparative analysis of legislative engagement between strong- and weak-form models of judicial review has not been undertaken.[5] This is a significant gap in the literature because analyzing legislative engagement in only one weak-form jurisdiction does not provide any indication on whether adopting weak-form judicial review increases dialogue because there is no standard against which the legislative engagement is compared. As is evident from the two hypothetical conversations, the judicial branch passing the law back to the legislative branch does not guarantee meaningful dialogue. Whether a meaningful dialogue—such as Conversation One—is the result of adopting weak-form judicial review is dependent on how the legislature proceeds after receiving the comments from the judiciary and is the focus of this article.

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[2] See *infra* Part II.C for a detailed discussion of the varieties and nuances of weak-form judicial review.

[3] Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT'L J. CONST. L. 167, 173 (2010) [hereinafter Gardbaum, *Reassessing*].

[4] Gardbaum, *Reassessing*, *supra* note 3, at 172; *see also infra* Part II C.

[5] *See generally,* ARUNA SATHANAPALLY, BEYOND DISAGREEMENT: OPEN REMEDIES IN HUMAN RIGHTS ADJUDICATION (2012).

This article proceeds in six parts. Part II introduces the various models of judicial review. It begins with the traditional form of legislative supremacy, before moving on to strong- and weak-form judicial review.[6] It describes the particularities of the different models and the strengths and weaknesses of each. It concludes by mentioning some of the reasons why it is legitimate to question whether adopting weak-form review actually results in increased meaningful dialogue and legislative engagement. Part III explains the framework through which legislative engagement will be analyzed, including the cautions and assumptions that will go into the analysis. Part IV presents the four different case studies. It begins with two countries with strong-form judicial review, the U.S. and India, before proceeding to weak-form judicial review and an examination of the U.K. model. Part V compares strong-form judicial review to weak-form judicial review. Part VI draws conclusions from the four case studies. In particular, this article demonstrates that legislative engagement is a factor that should be analyzed alongside judicial deference or activism and legislative deference or response in assessing the benefits of models of weak-form judicial review. In addition, the article challenges assumptions about weak-form judicial review and shows that legislatures in models of weak-form judicial review might not sufficiently engage themselves in rights- and constitutional-based issues, and, therefore, the dialogic benefits of weak-form judicial review might not be achieved. In contrast, there does appear to be more significant engagement in strong-form judicial review systems, indicating the potential for dialogue and thus the necessity for further analysis into the normative reasons for this difference.

[6] Although these are the names used in this article to describe the various forms of judicial review, they have many different names. I will briefly mention these other names in Part II below. *See infra* II. The theories underpinning these models are sometimes referred to as political constitutionalism (for legislative supremacy), legal constitutionalism (for strong-form judicial review), and new or intermediate constitutionalism (for weak-form judicial review). *See* Marco Goldoni, *Two Internal Critiques of Political Constitutionalism*, 10 INT'L J. CONST. L. 926, 926–27 (2012). For clarity and consistency, I will not use these terms in this article but will instead refer to the models being used.

II. MODELS OF JUDICIAL REVIEW

It is notoriously difficult to precisely categorize the various models of judicial review. The problems are replete. Some models of judicial review are expressly written in the text of constitutions.[7] Unfortunately, however, the provisions can be ambiguously written or designed. Some models of judicial review are not written in the text of a constitution but have become apparent through constitutional events.[8] Others, despite being written one way in a constitution, are practiced very differently in reality.[9] Others constantly change due to the struggle between the various branches of government over where the power shall lie. In addition, there is an ongoing debate among scholars over the boundaries of each model of judicial review that further clouds the picture.[10] Nevertheless, it is important to attempt categorization because this is helpful for testing theories and for results to emerge. The following three subsections will make such an attempt, beginning with legislative supremacy before moving to strong-form and weak-form judicial review. Each section will begin with a proposed definition for each category of judicial review. It will then briefly address the history of each model, the various forms they may take, and the alleged benefits and critiques of each.

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[7] *E.g.*, ÖSTERREICHISCHE BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] as last amended in 1929 as to No. 153/2004, art. 140 (Austria) (explicitly declaring the Constitutional Court's power to pronounce laws unconstitutional).

[8] *E.g.*, Nathan J. Brown, *Judicial Review and the Arab World*, 9 J. DEMOCRACY 85, 88 (1998) ("While judicial review has most often been established by clear constitutional mandate rather than by a judicial decision, courts in Egypt, Tunisia, and Jordan have joined their counterparts in the United States and Israel in asserting a right to judicial review despite the absence of explicit constitutional authorization.").

[9] *See* Rivka Weill, *The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution-Making*, 62 AM. J. COMPAR. L. 127, 130 (2014) (arguing that the strength of judicial review is the "result of the political processes that accompany the adoption and amendment of the constitution, rather than the results of the language of constitutional provisions.").

[10] *Compare* Aileen Kavanagh, *What's So Weak About "Weak-Form Review"? The Case of the UK Human Rights Act 1998*, 13 INT'L J. CONST. L. 1008, 1008 (2015) (arguing that the distinction between strong- and weak-form judicial review is not that clear), *with* Stephen Gardbaum, *What's So Weak About "Weak-Form Review"? A Reply to Aileen Kavanagh*, 13 INT'L J. CONST. L. 1040, 1041 (2015) (arguing that the distinction lies in the "interplay" of the distinctive features of weak-form judicial review).

A. *Legislative Supremacy*

Legislative supremacy, also known as parliamentary sovereignty or parliamentary supremacy,[11] encompasses the idea that the legislative branch of government is the "supreme and absolute power" driving a government and acts as the decision-making authority in the legal system.[12] More specifically, to consider a system of ideal legislative supremacy, the legislative branch must have the power to pass whatever laws it pleases and no entity other than the legislative branch itself has the power to annul these laws.[13] Traditionally, there have been additional limitations, such as the legislature not having the power to enact statutes that restrict its successors and constitutional law and regular law being equal.[14] These additional requirements, however, do not enjoy universal acceptance.[15]

The most famous example of a system of legislative supremacy is in the U.K., where it evolved into its modern form from the sovereignty of the medieval King.[16] Since God appointed the King, and the King was the source of all judgments of law, the King could not be compelled to follow the law other

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[11] Note that scholars do not agree that these two names are interchangeable. For example, some argue that legislative or parliamentary *supremacy* refers to when the legislature has the final say on a limited range of options or within a specified area, whereas legislative or parliamentary *sovereignty* refers to when the legislature has the final say on everything and is in no way restricted. Peter Oliver, *Sovereignty in the Twenty-First Century*, 14 KING'S COLL. L. J. 137, 138–39 (2003).

[12] JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY 126 (2001).

[13] *See* ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 37–38 (8th ed. 1915) (discussing the principle of parliamentary sovereignty in the U.K.).

[14] *See id.* at 39–40.

[15] *See, e.g.*, Anthony Bradley, *The Sovereignty of Parliament-Form or Substance*, *in* THE CHANGING CONSTITUTION 35, 66–68 (Jeffrey Jowell & Dawn Oliver eds., 7th ed. 2011). Bradley argues the doctrine of parliamentary sovereignty in the U.K. has evolved from an absolutist position toward one that might not impose such stringent requirements as the restriction on binding future parliaments. *Id.* As evidence of this shift, he uses various instances in which the Parliament has bound successor Parliaments; for example, the European Communities Act of 1972 restricts Parliament by allowing courts to decide whether an Act of Parliament complies with EU law. *Id.* at 52–56.

[16] *See* GOLDSWORTHY, *supra* note 12, for an excellent and thorough history of how Parliamentary Sovereignty came to be in the United Kingdom.

than by political means.[17] As time went on, a Parliament formed as an instrument of the King, and it began to exercise its own lawmaking power.[18] Despite some disagreement over who had final lawmaking authority, all parties agreed that as the highest organ of government representing the people, neither law nor judicial interpretations of law bound Parliament.[19] Instead, Parliament was bound only by moral limits that the people would enforce because Parliament represented the people.[20]

A similar evolution occurred as well in continental Europe, where legislative supremacy was predominant at least until the middle of the 20th century.[21] After World War II, however, most countries in Europe switched from a system of legislative supremacy to one of strong-form judicial review.[22] In continental Europe, the Netherlands and Switzerland are arguably the only countries that have retained a system of legislative supremacy.[23] In addition, because of the U.K.'s legislative supremacy, the U.K. transplanted similar systems in its colonies, such as in India, New Zealand, and Australia.[24] Outside of Europe and select Commonwealth countries, there is only a modicum of other countries that have systems of legislative supremacy. In the Middle East, for example, Oman, Qatar, and Saudi Arabia have abstained from implementing any form of judicial review of legislation.[25]

Countries select a model of legislative supremacy for several reasons. First, and most importantly, many believe legislative

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17 GOLDSWORTHY, *supra* note 12, at 32.

18 GOLDSWORTHY, *supra* note 12, at 275.

19 GOLDSWORTHY, *supra* note 12, at 59–60.

20 GOLDSWORTHY, *supra* note 12, at 232–33. Ironically, and as is discussed in more detail *infra* Part II C, the United Kingdom might no longer be considered a system of legislative supremacy in the strict sense of the term.

21 *See* Gustavo Fernandes de Andrade, Essay, *Comparative Constitutional Law: Judicial Review*, 3 J. CONST. L. 977, 978 (2001).

22 *But see infra* Part II B, C (discussing how some of these countries have evolved to systems of judicial review).

23 In the Netherlands, "[t]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts." GW. [Constitution] art. 120 (2018). In Switzerland, although cantonal (state) law may be judicially reviewed, federal statutes may not. BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, art. 189 (Switz.).

24 *See infra* Part II C.

25 Brown, *supra* note 8, at 89.

supremacy to be the most democratic form of lawmaking because it "reserv[es] to the highest democratic body . . . the final say about the content of the law."[26] Through its representation of the people, the legislature puts forward the collective will of the people. Indeed, the government's legitimacy to exercise its powers is predicated on the consent of the people to be governed.[27] Thus, legislative supremacy is theoretically the most democratic because the people that the laws govern make final decisions about laws.[28] Relatedly, advocates of legislative supremacy argue that legislatures are better poised to interpret laws in a way that satisfies the people because, unlike judges who are usually not democratically elected, legislators are accountable to their constituents and thus should be attuned to the realities of life for their constituents.[29] As such, when pressed with arguments against legislative supremacy, proponents argue not to change the entire system but instead to focus on "improving democratic processes through such measures as reformed electoral systems and enhanced parliamentary scrutiny."[30]

The second reason underlying legislative supremacy is a far

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[26] Nicholas W. Barber, *The Afterlife of Parliamentary Sovereignty*, 9 INT'L J. CONST. L. 144, 148 (2011).

[27] *See generally* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690).

[28] It is for this reason that some theorists of legislative supremacy argue that the legislature cannot pass laws that restrict future legislatures because if they could, then they could bind a future generation of people and that future generation would not be able to decide what the law was for themselves. GOLDSWORTHY, *supra* note 12, at 234, 70 ("Each generation should be equally free to reform its laws–including its constitution–as it deems appropriate."); *see also* Barber, *supra* note 26, at 145–49 (discussing the debate over whether Parliament can restrict its future self and elaborating the views of "orthodox" and "manner-and-form" theorists in this debate).

[29] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346, 1378 (2006) (arguing that legislatures are aware of the plights of their constituents and that society's tolerability for a particular course of action is included in the decision-making process through features such as elections, campaigning, lobbying, hearings, and debate); *see also* GOLDSWORTHY, *supra* note 12, at 234 (discussing how "judges could not be trusted with authority to nullify Parliament's judgments").

[30] RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY, at i (2007). Bellamy also mentions how certain "pseudo-democratic" measures such as referenda are insufficient for improving democratic legitimacy because they only help to advance the agendas of the elites. *Id.* at 263. Instead, he believes that efforts should at least be made for proportional representation. *Id.* at 262.

more pragmatic one. Proponents of legislative supremacy argue that giving the last word on the interpretation of a law to the body that created the law results in more efficient governing.[31] The argument under legislative supremacy is that the legislature can conduct its affairs and respond to emergencies without being second-guessed by any institution other than itself.[32] This allegedly allows for the government to better care for and protect its citizens. Proponents further argue legislative supremacy promotes clarity on the status of laws. Instead of leaving citizens unsure about the application of a law until a court has opined on it, the law is clear when the legislature passes the law because no one can override or modify it other than the legislature by a subsequent act. Despite these arguments in support of legislative supremacy, it is a dying model. Throughout the twenty-first century most countries have adopted systems of strong-form judicial review, which is considered next.

B. *Strong-Form Judicial Review*

Strong-form judicial review, also known as judicial supremacy, concerns the legal authority of a court's constitutional interpretation. In models of strong-form judicial review, it is undisputed that the court's constitutional interpretation binds parties before it and these parties are bound to act in accordance with the court's interpretation.[33] Though less widely accepted, strong-form judicial review also generally means that the judicial branch's interpretation of the constitution binds other actors within the government, such as the executive and legislative branches, and the state governments.[34] Thus, when a court rules

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[31] *See* GOLDSWORTHY, *supra* note 12, at 234 ("as a matter of either logical or practical necessity, there had to be a single, ultimate, and unlimited law-making power").

[32] *See* GOLDSWORTHY, *supra* note 12, at 234 ("if its authority were limited, Parliament might be unable to take extraordinary measures needed to protect the community in emergencies").

[33] Stephen Gardbaum, *What is Judicial Supremacy?*, *in* COMPARATIVE CONSTITUTIONAL THEORY 21, 24 (Gary Jabobsohn & Miguel Schor eds. 2018).

[34] *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1361–62 (1997); *see also* Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1140 (2011) (disaggregating judicial supremacy into vertical—binding authority over the state governments, and

that a statute passed by the legislature conflicts with the constitution, the statute is no longer valid law and that interpretation is final. Although the "strength" of a court falls on a spectrum, for purposes of this analysis, a court has the power of strong-form judicial review if (1) the court can invalidate, modify, or not apply legislation that it believes is in conflict with a higher law, such as a constitution; (2) it does, in fact, use this power; and (3) its decisions are mostly accepted by citizens and by the other branches of government.[35] In addition, despite the ability of courts to use measures of judicial deferral to avoid potentially contentious disputes with the legislative branch, courts are nevertheless models of strong-form judicial review if they, for example, use such deferral techniques in an effort to retain their credibility and enhance their power, rather than merely to acquiesce to the legislature.[36]

Although certain scholars have argued that judicial review and invalidation of legislation can be traced back to ancient Athens[37] or Jerusalem,[38] it gained prominence through the

horizontal—binding authority over the coordinate federal branches). *But see infra* Part IV A (discussing departmentalism in the U.S., a model of strong-form judicial review).

[35] *See* Stephen Gardbaum, *What Makes for More or Less Powerful Constitutional Courts?*, 29 DUKE J. COMP. & INT'L L. 1, 39–40 (2018) (discussing how the level of power a court has is hard to quantify but arguing that the most appropriate measure of power is how consequential it is as an institutional actor, which itself is based on formal rules, actual practice, and its operational political context).

[36] *Cf.* Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 62–64 (2016) (explaining that there is a fine balancing act between using judicial deferral to retain institutional legitimacy and promote dialogue and having the court lose all its power to protect minorities from majorities). Delaney compares deferral by the U.S. Supreme Court, the European Court of Human Rights (ECtHR) and the apex courts of Canada and South Africa. She finds that despite the opaque deferral techniques used by the U.S. Supreme Court, the deferrals have actually strengthened the court's institutional legitimacy and allowed it to "accrue power mostly out of the public eye." *Id.* at 62. In contrast, the ECtHR is candid about its limitations and will often allow state limitations on substantive rights until a public consensus has developed. *Id.* Publicly acknowledging such limitations and refusing to overturn statutes until a majority public consensus has developed is overly deferential and limits the court's ability to "fulfill the countermajoritarian aspiration." *Id.*

[37] Keith Werhan, *Popular Constitutionalism, Ancient and Modern*, 46 U.C. DAVIS L. REV. 65, 76–85, 96–108 (2012) (discussing how in ancient Athens, citizens could begin legal proceedings against other citizens who had proposed decrees that allegedly went against the highest law, *monos*, and that if the *dikasteria*, a large

American tradition where it first began to appear in works of revolutionary political theory.[39] Alexander Hamilton in *The Federalist No. 78* remarked that judges have the power to ascertain the meaning of the Constitution and statutes, and that if there is "irreconcilable variance between the two . . . the Constitution ought to be preferred to the statute"[40] This theory was a reaction to the British model of legislative supremacy that, in the eyes of the founders, failed to protect fundamental rights and liberties.[41] As a result of these sentiments, the U.S. Constitution allowed for judicial review to become established by making the Constitution and the rights found therein the supreme law of the land, by declaring that normal legislation could not change this law, and allowing for the enforcement of these rights by a judicial power.[42]

Although the Constitution theoretically provided the landscape for judicial review, it was not until the landmark case of *Marbury v. Madison*[43] that judicial review gained prominence.[44] In *Marbury*, Justice John Marshall declared the power of judicial

body of average citizens that served a judge and jury, found the decree to be in violation of *monos*, then the decree would be invalidated and the citizen who had proposed the decree punished).

[38] David C. Flatto, *The Historical Origins of Judicial Independence and Their Modern Resonance*, 117 YALE L. J. POCKET PART 8, 11 (2007), https://www.yalelawjournal.org/forum/the-historical-origins-of-judicial-independence-and-their-modern-resonances (discussing how "two formative moments in the Hebraic tradition–one biblical (Deuteronomy), the other rabbinic (the Mishnah)–insist on establishing an independent judiciary operating beyond the reach of the king" and how the biblical tradition specifically subordinates the king to the judiciary).

[39] *See* Scott D. Gerber, *The Political Theory of an Independent Judiciary*, 116 YALE L.J. POCKET PART 223, 223 (2007), https://www.yalelawjournal.org/forum/the-political-theory-of-an-independent-judiciary.

[40] THE FEDERALIST No. 78 (Alexander Hamilton).

[41] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMPAR. L. 707, 711 (2001) [hereinafter Gardbaum, *New Commonwealth Model*].

[42] Gardbaum *New Commonwealth Model*, *supra* note 41, at 707–08. Note, however, that the U.S. Constitution does not explicitly provide that judicial review of legislative acts are non-reviewable by Congress.

[43] Marbury v. Madison, 5 U.S. 137 (1803).

[44] *See generally id.*; *but see* William M. Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 457–58 (2005) (arguing that judicial review was more widespread than many believe, having found twenty-nine cases from before *Marbury* in which U.S. courts invalidated legislation).

review by, *inter alia*, claiming that the U.S. Constitution is the "paramount law."[45] If the Courts "clos[ed] their eyes" to a legislative act that conflicted with the Constitution, it would be giving the legislature an "omnipotence" that the founders did not envision or intend.[46] Although the decision established a previously unrecognized power of judicial review for the Supreme Court, it did so in a way that appeased the political branches and therefore did not receive much backlash.[47] After *Marbury*, judicial review persistently grew in strength in the U.S. with twenty-two statutes invalidated in the 19th century and 125 statutes invalidated in the 20th century.[48]

Given the success of the American system of strong-form judicial review, most countries around the world also adopted models of strong-form judicial review throughout the 20th century.[49] The two most prominent scenarios in which countries have adopted strong-form judicial review are: (1) to ensure that rights are protected from the political branches in the wake of rights abuses by the government;[50] and (2) to create a neutral third party to resolve disputes between divisive political branches and communities.[51] In addition, some established democracies not falling into the above scenarios have also switched to strong-form judicial review.[52] The possible reasons for these switches are: (1) that adopting strong-form judicial review is associated with the incorporation of supranational law, such as with the

45 *Marbury,* 5 U.S. at 177.

46 *Id.* at 177–78.

47 *See* Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 WIS. L. REV. 683, 686 (2016) (discussing how the *Marbury* strategy is a "'second-order' function of judicial deferral"); *see generally* Delaney, *supra* note 36.

48 *See generally Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States*, S. Doc. No. 108–17 (2d Sess. 2002), https://www.govinfo.gov/content/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-10.pdf.

49 Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62 AM. J. COMP. L. 613, 613–14 (2014) [hereinafter Gardbaum, *Separation of Powers*].

50 *See* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 776–78 (1997).

51 Gardbaum, *Separation of Powers*, *supra* note 49, at 613, 614–15.

52 *See* Gardbaum, *Separation of Powers, supra* note 49, at 615–16.

incorporation of the European Court on Human Rights in European countries,[53] (2) that it is a widespread constitutional norm to have judicial review and countries need to have such systems to "fit in,"[54] and (3) that recent developments have "undermined faith in political accountability as an effective and sufficient check on the undue concentration of governmental authority," thereby requiring yet another check the political branches.[55] Currently, approximately eighty percent of the world's countries have established strong-form judicial review.[56]

There are many alleged benefits of strong-form judicial review, but the one most often presented is that it prevents a potentially despotic majority from placing its interests above those of the minority.[57] Generally, all that is needed to pass legislation is a majority of the legislators representing a majority of the people; therefore, barely over half of the people can theoretically impose its will on the other, only slightly smaller, half. Judicial review steps in as a non-politically motivated neutral check on such exercises of power, thereby protecting the rights of minorities.[58] Additionally, it is thought that courts should be involved in invalidating statutes that infringe upon rights because it is better to have overenforcement of rights than underenforcement.[59]

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[53] RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 2 (2004) (calling this phenomenon the "incorporation scenario").

[54] Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J. L. ECON. & ORG. 587, 588–89 (2014).

[55] Gardbaum, *Separation of Powers*, *supra* note 49, at 613.

[56] *Cf.* Ginsburg & Versteeg, *supra* note 54, at 588 (noting in 2011 that 83% have strong- or weak-form judicial review). Another distinction is between centralized and decentralized models of judicial review. For an explanation of this distinction. *See generally*, Albert HY Chen & Miguel Poiares Maduro, *The Judiciary and Constitutional Review*, *in* ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW, 97, 102–3 (Mark Tushnet et al. eds., 2015).

[57] *See* Alexander Kaufman & Michael B. Runnels, *The Core of an Unqualified Case for Judicial Review: A Reply to Jeremy Waldron and Contemporary Critics*, 82 BROOK. L. REV. 163, 163–64 (2016); *see also* THE FEDERALIST No. 51 (James Madison) (stating that "if a majority be united by a common interest, the rights of the minority will be insecure").

[58] It also serves as a neutral check upon the interplay between the executive and legislative branches of a republican government; however, given that separation of powers is not the focus of the article, this point will not be expanded.

[59] *See* Richard H. Fallon, *The Core of an Uneasy Case for Judicial Review*, 121

There are two primary critiques of strong-form judicial review. The first is that it is undemocratic and that important rights-based questions should instead be delegated to the public and its representatives for debate.[60] The best counterargument to this is that democratic governance is only achieved when all citizens participate in the governmental process together on equal terms, and therefore, because not all people equally participate in politics, allowing majorities to decide issues is not actually democratic.[61] Instead, the court should serve as a "referee . . . to police the political process" and should "reinforce representation and enhance participation in both the processes of democratic government and in the government's distribution of benefits."[62] Additionally, the critique that strong-form judicial review is undemocratic in comparison to legislative supremacy is not entirely persuasive considering how elections are often "too blunt, too infrequent, and typically raise too many issues for electoral consideration" to be effective manifestations of democratic will.[63] Other valid, though less persuasive, arguments attempt to claim that strong-form judicial review is not undemocratic because legislators can amend the constitution if they disagree with the court, judges are appointed by legislators representing the people, and citizens have access to the judicial

HARV. L. REV. 1693, 1735 (2008). Fallon is careful to note, however, that this theory does not apply when the court is deciding a case between competing rights because in such a case it will invariably have to overenforce one right and underenforce the other.

60 Richard Bellamy, *The Political Form of the Constitution: The Separation of Powers, Rights, and Representative Democracy*, 44 POL. STUD. 436, 456 (1996). *But see* Annabelle Lever, *Democracy and Judicial Review: Are They Really Incompatible?*, 7 PERSP. ON POL. 805, 808 (2009) (noting that many electoral systems allow parties elected with only a minority of the vote to form a government; therefore, even giving the decision to the political branches is not necessarily democratically justified); *see also* Jane Mansbridge, *A "Selection Model" of Political Representation*, 17 J. POL. PHIL. 369, 386–87 (2009) (suggesting that legislators should be selected based on superior wisdom and should thus should not constrain themselves to the ideals of their constituents).

61 Kaufman & Runnels, *supra* note 57, at 163–64 ("the defining quality of democratic government—according to such leading theorists as Ronald Dworkin, Joshua Cohen, and Cécile Fabre—is . . . the joint and equal participation of citizens in the process of self-government.").

62 Paul N. Cox, *John Hart Ely, Democracy and Distrust: A Theory of Judicial Review*, 15 VAL. U. L. REV. 637, 639–40 (1981).

63 Lever, *supra* note 60, at 811.

system and therefore can engage in governmental processes.[64]

The second primary critique is that strong-form judicial review allows legislators to shirk their constitutional responsibilities by relying on the court.[65] Under this critique, legislators will ignore constitutional issues in legislation, knowing that the court will fix any defects; or legislators will base their constitutional interpretation on how they think the court will interpret the issue, rather than hold independent constitutional judgment.[66] The general counterargument to this is that the critique is based on an "exaggerated view of legislators' ability and high-mindedness."[67] Politics, it is alleged, is not rational and interest groups and economic elites often drive it; therefore, restraining judicial review will likely not result in any meaningful improvement in legislative constitutional thought because legislators will still not be incentivized to legislate for the common good.[68] In light of these critiques, certain countries

64 *See* Waldron, *supra* note 29, at 1394–95 (discussing these arguments and why they do not persuade him). Another argument is that judges, by being presented with particularized facts after the statute has already been in effect, can inform the legislature of an inadequacy in their statute that they did not initially realize. I do not include this argument above, however, because it also works with weak-form judicial review, discussed *infra* Part II C.

65 This argument was first advanced and made famous by James Thayer. *See generally* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893); *see also* James B. Thayer, *John Marshall*, *in* JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL 3, 86 (1967) ("The tendency of a common and easy resort to [judicial review of legislation], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is not a light thing to do that."). *But see infra* Part IV C (discussing how it is possible that this happens in models of weak-form judicial review as well).

66 James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893).

67 Richard Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 550 (2012).

68 *See* Gary Lawson, *Thayer Versus Marshall*, 88 NW. L. REV. 221 (1993) (discussing how the case against Thayerism, in which courts defer to legislatures on constitutional questions because legislators are wise and politically adept, is rooted in the fact that politics is often invective and irrational); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 Cornell L. Rev. 1445, 1455-66, 1467-68 (2016) (arguing that politics in the United States is dominated by economic elites and "the preferences of the vast majority of Americans appear to have essentially no impact on which policies the government does or doesn't adopt," and that this is problematic for Republicanism because it contradicts the assumption that legislators are "free of interested ties and paid by

have turned to a model that strives to find a middle ground: weak-form judicial review.

C. *Weak-Form Judicial Review*

Weak-form judicial review attempts to bridge the gap between legislative supremacy and strong-form judicial review by institutionalizing a system that is theoretically supposed to have the rights protection of strong-form judicial review with the democratic legitimacy of legislative supremacy.[69] Models of weak-form judicial review have three essential characteristics: (1) a constitution or bill of rights; (2) courts with the power to interpret the constitution or bill of rights and to assess statutes for conformity with such interpretation; and (3) legislatures with the formal power to override the court's interpretation with ordinary legislation.[70] In practice, this means that although the court may declare that in its view a statute is incompatible with a bill of rights, this does not settle the issue and the statute will return to the legislature who will decide if they agree or disagree with the court's interpretation. In this regard, it is said that weak-form judicial review reserves for the legislature the "final word."[71]

Note that this article's definition of the characteristics of weak-form judicial review excludes certain countries that arguably have models of weak-form judicial review. First, it excludes countries that have legislatures that can, and do, override the decision of courts with extraordinary legislation, *e.g.,* constitutional amendment by two-thirds majority. Therefore, for example, the Asian states of Singapore and Malaysia—where the decisions of courts are frequently overturned by constitutional amendment of a two-thirds majority—do not fit within my definition of weak-form judicial

no masters" and legislate for the "common good.").

69 Gardbaum, *Reassessing*, *supra* note 3, at 169, 171 ("The new model is . . . intermediate between [the] two previously exhaustive polar options" and "provides a better balance between the two constitutional goods.").

70 Gardbaum, *Reassessing*, *supra* note 3, at 170 ("[T]he model's great novelty is to decouple the power of judicial review from judicial supremacy or finality.").

71 Gardbaum, *New Commonwealth Model*, *supra* note 41, at 709.

review.[72] Second, my definition excludes countries that do not have the *formal* power to overturn the decisions of courts with ordinary legislation. This serves to exclude countries with models of parliamentary sovereignty that can implicitly repeal past legislation via ordinary future legislation.[73] This article excludes these two categories because they speak more to the level of constitutionalism rather than to the model of judicial review. They fit more in categories that could be called "weak courts (or strong-legislatures) in models of legislative supremacy" or "strong courts (or weak legislatures) in models of strong-form judicial review," rather than in an actual model of weak-form judicial review. This article also excludes them because this article attempts to analyze whether adopting a formal system of weak-form judicial review increases constitutional dialogue, rather than whether evolving constitutional norms of judicial deference and the subjective strength of the various institutions results in increased constitutional dialogue.[74]

The first instance of weak-form judicial review came from Canada.[75] In 1982, Canada legally separated from the U.K.[76]

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[72] Constitution of the Republic of Singapore, art. 5, Aug. 9, 1965; *Malaysia*: *Federal Constitution*, art. 159, Aug. 27, 1957; *see generally* PO JEN YAP, CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA (2015) (discussing several constitutional crises in Hong Kong, Singapore, and Malaysia and arguing that further deference by the judicial branch in countries with dominant political parties would enhance constitutional dialogue).

[73] The theory being that in a country with legislative supremacy, if a court rules a statute to be invalid, the legislature can enact another law via simple majority that, per the doctrine of implied repeal, would override the court's decision because the most recent statute would be given effect over the previous statute. The legislature in a system of legislative supremacy does not need to explicitly be given such override power because the legislature is by nature supreme. *But cf.* Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L. Q. 457, 504–05 (2012) (arguing that Israel has a form an intermediate constitutionalism because there exists a tradition of parliamentary sovereignty concurrent with the presence of the power of judicial review of legislation).

[74] *See* Grégoire Webber, *The Unfulfilled Potential of the Court and Legislature Dialogue*, 43 CANADIAN J. POL. SCI. 443, 457 (2009) (arguing that although weak-form constitutional review "may facilitate dialogue . . . but the dialogue must come from outside [from] political culture . . . and commitment to performance of dialogue").

[75] Weill, *supra* note 73, at 506–10 (discussing how the formal override power has its roots in the power of implied repeal found in models of parliamentary

With this separation, Canada passed the Constitution Act of 1982, which included the Canadian Charter of Rights and Freedoms.[77] The Charter guarantees certain fundamental rights that may be enforced in the courts and that enjoy the status of supreme law.[78] Although Prime Minster Pierre Trudeau wanted the Constitution to have similar strength and effect as the American one, provincial politicians were wary of straying too far from the model of parliamentary sovereignty.[79] As a compromise in order to secure passage, Section 33 was included at the last minute.[80] Section 33 declares that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature . . . that the Act or a provision thereof shall operate notwithstanding a [fundamental right] of this Charter."[81] Such a declaration lasts for five years and is renewable.[82] Therefore, in theory, if a court declares a statute incompatible with the Charter, Parliament can pass a law via simple majority stating that the statute at issue applies "notwithstanding" the court's finding that it violates a Charter right.[83]

Weak-form judicial review has since been adopted in different versions in the U.K., Australia, and New Zealand.[84] In the U.K. and Australia, weak-form judicial review comes in the form of a statutory bill of rights and the judicial power to declare

sovereignty).

[76] *See* Canada Act, 1982, c. 11 (U.K.), § 2.

[77] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, ch. 11 (U.K.) [hereinafter Constitution Act]. Note that Canada did have a form of legislative override in the Canadian Bill of Rights enacted in 1960. *See* Gardbaum, *New Commonwealth Model*, *supra* note 41, at 722.

[78] Constitution Act, *supra* note 77, at §§ 32, 52.

[79] Gardbaum, *New Commonwealth Model*, *supra* note 41, at 721.

[80] Gardbaum, *New Commonwealth Model*, *supra* note 41, at 721–22.

[81] Constitution Act, *supra* note 77, at § 33(1).

[82] Constitution Act, *supra* note 77, at §§ 33 (3), (4).

[83] Ironically, this power has almost never been used other than in Quebec where it is used as a blanket statement in all provincial legislation.

[84] Outside of these countries, Poland, Romania, Mongolia, Belgium, Finland, and Luxembourg have also briefly experimented with weak-form judicial review. STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE 5–6 (David Dyzenhaus & Adam Tomkins eds., 2013) [hereinafter GARDBAUM, THEORY AND PRACTICE].

statutes incompatible with the bill of rights.[85] In contrast to Canada, such declarations do not render the incompatible statutes void but merely pass the issue back to the legislature to have the final word.[86] In these countries, courts also have an obligation to interpret statutes to the maximum extent possible in a way that does not conflict with the applicable bill of rights.[87] In contrast, in New Zealand, courts cannot declare a statute incompatible but do have the obligation to interpret statutes to the maximum extent possible in a way that does not conflict with the country's Bill of Rights.[88]

As previously discussed, the principal benefit of weak-form judicial review is that it institutionalizes a system that attempts to protect individual rights while maintaining democratic legitimacy. Instead of the will of the legislature or judiciary being opposed in a "monologue," there is an "inter-institutional dialogue" between the two that should help limit the countermajoritarian difficulty but also protect individual rights.[89] This dialogue, beyond balancing democracy and protecting rights, has numerous alleged benefits.[90]

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[85] *See* Human Rights Act 1998, ch. 42, § 4 (U.K.) [hereinafter UK HRA]; *Human Rights Act 2004* (ACT) s 32 (Austl.) [hereinafter ACT HRA]; *Charter of Human Rights and Responsibilities Act 2006* (Vic.) s 28 (Austl.) [hereinafter VCHRR]. Note that Australia has institutionalized weak-form judicial review at the State level but not at the federal level.

[86] *See* UK HRA, *supra* note 85, at § 4(6); ACT HRA, *supra* note 85, at s 32; VCHRR *supra* note 85, at ss 28, 31 (stating a declaration of incompatibility is not binding on the parties to the proceedings in which it is made). The precise operation of the UK HRA will be addressed *infra* Part IV C.

[87] UK HRA *supra* note 85, at § 3; ACT HRA *supra* note 85, at s 30; VCHRR *supra* note 85, at s 32.

[88] New Zealand Bill of Rights Act 1990, s 6 (N.Z.) [hereinafter NZBORA].

[89] Gardbaum, *New Commonwealth Model*, *supra* note 41, at 745; *see also* Peter Hogg & Allison Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps Why the Charter of Rights Isn't Such a Bad Thing After All)*, 35 OSGOODE HALL L. J. 75 (1997) (advancing Constitutional Dialogue in weak-form judicial review in their seminal article on the Canadian Charter).

[90] Note that several prominent scholars believe that "dialogue" is not the principal benefit nor a useful theory for weak-form judicial review. For example, Stephen Gardbaum believes that dialogue is not the correct lens through which to view weak-form judicial review because other forms of review also have dialogue, for example, departmentalism. *See* Gardbaum, *Reassessing*, *supra* note 3, at 181. Instead, he posits that that the principal benefit of weak-form judicial review is the balance between protecting rights and promoting democracy. Gardbaum, *Reassessing*, *supra* note 3, at 182. As I will discuss, while I generally agree, I also

First, inter-institutional dialogue can lead to a richer and more holistic interpretation and enforcement of rights. The "iterative process" of dialogue among the branches of government increases the amount of information available to the courts and legislatures in assessing social and economic rights protections.[91] While determining how to enforce protection of rights is "information intensive," courts and legislatures are limited in the information they can compile; therefore, a dialogue whereby the courts and legislatures share information is beneficial and more information will lead to more systematic and effective enforcement of rights.[92] Courts and legislatures have different areas of expertise and methods of interpretation. Courts often rely solely on legal arguments whereas legislatures may rely also on moral and political judgments.[93] Thus, a dialogue between the two branches results in a richer rights interpretation because a variety of different points of view are included.[94] Open dialogue between the branches can also help spur a "society-wide constitutional discussion" which can ultimately lead to more consensus on the interpretation of a right.[95]

Second, courts remanding issues to the legislature in a constitutional dialogue allows the courts to help the legislature overcome some of its institutional shortcomings. Rosalind Dixon has classified these shortcomings as legislative "blind-spots" and

believe that if there is not a meaningful dialogue between the branches, then there is not a balance between protecting rights and promoting democracy because one will take precedence over the other. Therefore, meaningful dialogue is a necessary condition for there to be balance.

91 *See* Mark Tushnet, *The Relation Between Political Constitutionalism and Weak Form Judicial Review*, 14 GERMAN L. J. 2249, 2258 (2013) (stating the iterative features of weak-form review elicit additional information for both the legislature and the courts to use as they engage and re-engage questions of enforcement).

92 *Id.*

93 *See* Rosalind Dixon, *The Core Case for Weak-Form Judicial Review*, 38 CARDOZO L. REV. 2193, 2226 (2017) (describing the Court's justification of *Roe v. Wade* as not relying on a thorough analysis of moral and political arguments as to when life begins).

94 *Cf.* Dixon, *Core Case*, *supra* note 93, at 2226.

95 Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1157 (2006).

"burdens of inertia."[96] In terms of blind-spots, legislatures are limited by time, resources, expertise, and the cognitive limits of the mind, and therefore cannot think of everything and might miss important aspects of rights issues when passing legislation.[97] Courts, by engaging in a dialogue with the legislature after the law has passed can bring these blind-spots to the attention of legislatures so that the legislature can decide how to deal with them.[98] In terms of burdens of inertia, legislatures might not sufficiently address minority rights because of political realities such as the necessity of building coalitions and political willingness.[99] By engaging in a constitutional dialogue, courts can remind legislatures that minority issues are important and that they deserve to be fully discussed and addressed at the legislative level.[100]

Although the dialogue generated by weak-form judicial review has numerous alleged benefits, for these benefits to accrue, the dialogue between the branches needs to be meaningful. The concept of dialogue "evokes an image of an equal rather than hierarchical relationship, where everyone shares their point of view and listens respectfully to alternative suggestions, evaluating them on their merits."[101] Without this sense of equality, cooperation, and respect, the dialogue is not meaningful and does not accomplish its purported benefits. For example, if the legislature always acquiesces to the court without evaluating the court's reasoning or exercising its own constitutional judgment, then rights can be interpreted in an entirely legalistic way without consideration to the various moral and political issues undergirding the right. Conversely, if the legislature entirely ignores the courts, the dialogue cannot overcome legislative inertia and blind-spots that risk hampering

96 *See generally* Dixon, *Core Case*, *supra* note 93.

97 Dixon, *Core Case*, *supra* note 93, at 2208–09.

98 Dixon, *Core Case*, *supra* note 93, at 2214–16.

99 Dixon, *Core Case*, *supra* note 93, at 2209–12.

100 Dixon, *Core Case*, *supra* note 93, at 2216–20.

101 Aileen Kavanagh, *The Lure and Limits of Dialogue*, 66 UNIV. TORONTO L. J. 83, 85 (2016); *see also* Kent Roach, *Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience*, 40 TEX. INT'L L. J. 537, 538 (2005) (characterizing dialogue as a "sense of openness, modesty, and willingness to learn from others").

minority rights. Additionally, it risks ignoring valid legal claims that the court might have been well-suited to make. Therefore, for weak-form judicial review to properly balance between protecting rights and promoting democracy, there needs to be meaningful dialogue.

Numerous scholars have opined on "true dialogue" and whether weak-form judicial review advances their position.[102] For some, the mere fact that there is official legislative action in the wake of a judicial decision, regardless of its substance, is demonstrative of dialogue.[103] Meanwhile, others assess the existence of true dialogue based on a legislative "practice of challenging court judgments."[104] These scholars believe if legislatures agree with courts, then the legislatures may merely acquiesce to the court's interpretation of the constitution.[105] Still, others argue that if the legislatures are not overriding judicial decisions, it is because the model of weak-form judicial review has increased the pressure on the judiciary to defer to legislative decisions, thereby constraining inter-institutional dialogue.[106] Although such approaches are factors to analyze in assessing weak-form judicial review, they do not capture the entire picture because legislatures and courts may simply agree with one another's own, independent interpretation.[107] Therefore, in analyzing whether there is a meaningful, or "true," dialogue

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[102] Kavanagh, *supra* note 101, at 96.

[103] *See* Hogg & Bushnell, *supra* note 89, at 82 (referring to dialogue occurrence when a "competent legislative body" both considers and reacts to judicial decisions).

[104] Webber, *supra* note 74, at 457–58 (stating "one must search for a disposition for dialogue evidenced by a legislative willingness to challenge and a practice of challenging court judgments coupled with active legislative engagement on constitutional questions").

[105] *See, e.g.*, Fergal F. Davis, *Parliamentary Supremacy and the Re-Invigoration of Institutional Dialogue in the UK*, 67 PARLIAMENTARY AFF. 137, 144–45 (2014) (referring to Parliament adjusting its legislation with that of the Court's interpretation only because it believes it will "be unable to make its own interpretation stick").

[106] Rosalind Dixon, *Weak-Form Judicial Review and American Exceptionalism* 2–3 (Univ. Chicago. Pub. L. & Legal Theory Working Paper No. 348, 2011).

[107] *See* Kavanagh, *supra* note 101, at 112 (highlighting that United Kingdom empirical studies reveal a reason for high compliance rate is that the legislature often agrees with "declarations of incompatibility" viewing them as uncontroversial 'quiet cases' which do not give rise to any legislative resistance or disgruntlement").

between the court and the legislature, one must not simply look at how often courts strike down legislation or how often legislatures override court decisions; instead, the analysis must also consider whether each party is performing its own independent institutional duties of constitutional interpretation during their part of the dialogue.

Some preliminary research into this question has been undertaken. Aruna Sathanapally provided an in-depth analysis of legislative engagement and responses to judicial declarations of incompatibility in the U.K., a weak-form jurisdiction.[108] She concludes that the legislative response has usually been cooperative because of the often non-controversial nature of declarations of incompatibility and that in the limited controversial cases where there has been legislative disagreement, the legislative response has never been to outright refuse to change a law in response to a declaration of incompatibility.[109] Her analysis, however, is limited because she does not provide a competing standard against which to judge the U.K.'s level of legislative engagement.[110] Rosalind Dixon and Brigid McManus have taken the first step toward a comparative analysis of the issue by examining legislative responses to three cases regarding the rights of non-citizens in immigration detention in the U.K., New Zealand, and Australia.[111] They conclude that the success of weak-form judicial review is driven by the level of legislative competition over rights interpretations, which is in turn driven by the quality of democratic institutions and the presence of competitive political parties.[112] Their analysis, however, is constrained because it selected a limited number of uniquely controversial cases and only compared weak-form models among themselves rather than against models of strong-form judicial review.[113] A comparative analysis of legislative engagement

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[108] SATHANAPALLY, *supra* note 5, at 7.

[109] SATHANAPALLY, *supra* note 5, at 224.

[110] *See* Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. CONST. L. 125, 126-27 (2005) (noting the limitations of single country studies).

[111] Rosalind Dixon & Brigid McManus, *Detaining Non-Citizens: Political Competition and Weak v. Strong Judicial Review*, 57 VA. J. INT'L L. 591, 594 (2018).

[112] *Id.* at 618–19.

[113] *But see* Hirschl, *supra* note 110, at 144-45 (explaining that according to the

between strong- and weak-form models of judicial review will more effectively determine whether adopting a model of weak-form judicial review will actually promote meaningful dialogue.

The lack of such a comparative analysis is a significant gap in the literature because there are several reasons why it is legitimate to question whether adopting weak-form review actually results in meaningful dialogue and legislative engagement. If the legislature knows that it will always have the final word, there is no incentive to concentrate on protecting rights and on the constitutionality of the laws passed because they can never be wrong. In contrast, in models of strong-form judicial review, where the court has the final word, the legislature will have the incentive to focus on the rights and constitutional issues because they want their legislation to succeed, and if they ignore those issues, they risk losing the legislation to a court decision. Relatedly, there is not a strong incentive in models of weak-form judicial review for the legislature to consider the court's interpretation because they are likely more motivated by political implications than legal implications, regardless of a remand by the court. Although the court's legal interpretation might be infallible, the legislature still does not have the political will and motivation to protect minority rights, and it is possible that a remand by the court does not necessarily create such political will. This article will now introduce a framework for comparatively analyzing the level of legislature engagement in strong- and weak-form models of judicial review and whether adopting weak-form judicial review results in increased legislative engagement, thereby promoting a meaningful dialogue with the courts.

"'most difficult case principle' . . . confidence in the validity of a given claim . . . is enhanced once it has proven to hold true in a case that is, *prima facie*, the most challenging our least favorable to it."). However, the "most difficult case principle" does not apply well here because, in the context of analyzing legislative engagement, it is likely that the more difficult or controversial the case, the more likely there to be legislative engagement. *Id.* Therefore, legislative engagement in weak-form judicial review increasing for "difficult" cases would not enhance our confidence in legislative engagement for non-controversial cases because the legislature could be disinterested in uncontroversial cases. *See infra* Part III B.

III. LEGISLATIVE ENGAGEMENT FRAMEWORK

This article does not attempt to analyze the substantive quality of a legislative decision. Nor does it attempt to analyze whether meaningful legislative engagement on a constitutional question resulted in the substantively "correct" result. Such analysis is nearly impossible because there is not one accepted method for analyzing the substance of a decision and disagreement on substance will nearly always remain. Moreover, no procedure for reviewing legislation is perfect and even the best systems will occasionally reach substantively dubious results.[114] Instead, this article is simply concerned with whether the legislative branch meaningfully engaged in a constitutional dialogue.

As previously discussed, a legislature needs to have an internal debate to engage meaningfully. Therefore, this article will focus on analyzing the quantity and quality of legislative engagement on an issue. This review is limited to instances where the legislature debated whether to overturn a judicial declaration of incompatibility or whether to enact a statute of similar scope after a judicial invalidation of a statute. It does not include instances where legislators merely "give vent to their disappointment" over a judicial decision—though the line may occasionally blur.[115]

A. *Assessing Legislative Deliberation*

Whether a legislative dialogue over the constitutionality of a statute is meaningful is necessarily subjective and can be based on numerous factors. Although this article is not an empirical assessment, it is worth looking to other empirical studies of deliberation for guidance. Jürg Steiner and colleagues have created what they call the "Discourse Quality Index" ("DQI") that purports to analyze the level of deliberation in plenary sessions as

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114 *See Waldron*, *supra* note 29, at 1372–76 (discussing whether to analyze judicial review from an outcome-related or process-related perspective and finding that while outcome-related reasons are important, they are "inconclusive.").

115 United States v. Morgan, 313 U.S. 409, 421 (1941) (noting the "practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press.").

well as committee meetings.[116] Notably, the DQI covers: "(1) participation in the debate; (2) level of justification of arguments; (3) content of justification of arguments; (4) respect shown toward other groups; (5) respect shown toward demands of other participants; (6) respect shown toward [counterarguments] of other participants; [and] (7) changes in position during debate."[117] Similarly, Edward Lascher has proposed measuring legislative deliberation via several indicators, notably: (1) attendance by legislators at the debate or hearing; (2) inclusion of a variety of perspectives; (3) framing arguments in terms of the public good; (4) ability to present information to bolster these arguments; (5) allowance of critiques and responses to the differing perspectives; and (6) the level of engagement and interaction among participants.[118] He also emphasizes that when assessing legislative debate, it is important to consider both quantitative as well as qualitative factors.[119] Although the various indicators mentioned will not be explicitly used, they are nevertheless useful to keep in mind when case studies introduce various forms of deliberation within the legislature. In addition, though these factors may be subjective and subject to manipulation, there are often instances where they will clearly delineate between a meaningful and non-meaningful debate. For example, one debate where many legislators all voice their opinions on the constitutionality of a law and ground their opinion in strong and diverse justifications will be more meaningful than a debate where only a few legislators declared their opinions and did not support their opinions with more than mere assertions that the statute was constitutional. Similarly, a debate where all legislators voice opinions with justifications but show no respect toward other participants, do not engage with counterarguments, and instead are set with their predetermined opinions can be said to lack the "dynamism" necessary to be considered a meaningful dialogue.[120]

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116 JÜRG STEINER, THE FOUNDATION OF DELIBERATIVE DEMOCRACY: EMPIRICAL RESEARCH AND NORMATIVE IMPLICATIONS 12 (2012).

117 *Id.*

118 Edward L. Lascher, Jr., *Assessing Legislative Deliberation: A Preface to Empirical Analysis*, 21 LEGIS. STUD. Q. 501, 509 (1996).

119 Lascher, *supra* note 118, at 510–11.

120 *See* Bjørn Erik Rasch, *Legislative Debates and Democratic Deliberation in*

Having discussed what to look for, it is important also to mention where to look. Although some scholars contend that floor debate is the most important area of deliberation, others have argued that committee hearings and markups are also important—if not more so—than floor debate.[121] These scholars argue that, whereas floor debate is truncated and generalized, committee hearings and markups allow for a more detailed and expert examination of the issue at hand; for example, by calling expert witnesses and analyzing their testimony.[122] However, because some bills can skip the committee process and because floor debate allows for more legislators to become involved in the debate, this analysis will not be limited to either one.[123] Instead, it will assess the multitude of legislative forums, including floor debates, hearings, and committee markups. It will also analyze the text and reports of particular bills for evidence of legislative debate. Although there are various other avenues through which legislators can debate an issue, such as private meetings, or meetings outside the legislative context, these will not be featured prominently in the analysis.[124]

Parliamentary Systems, THE RSCH. PROGRAMME ON DEMOCRACY 5–6 (2011) (Nor.). *But cf.* Lascher, *supra* note 118, at 506 (noting that an assessment of open-mindedness is necessarily difficult because the line between "hewing to a set of core principles" and "being unwilling to consider how such principles relate to a particular set of circumstances" is ambiguous.).

121 *See* Paul J. Quirk, *Structures and Performance: An Evaluation*, THE POST-REFORM CONGRESS 303, 307 (1992).

122 *Id.* at 307–08; *see also* Lascher, *supra* note 118, at 507–08 (mentioning that we should hesitate excessively crediting floor debate because it is possible that truncated floor debate is simply the result of more thorough deliberation in the committee setting).

123 *See* Abbe R. Gluck, Anne Joseph O'Connell, & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1800 (2015) (finding significant "process deviations" in the passing of legislation). For example, Gluck found that "in the first year of the 112th Congress, fewer than 10% of enacted laws proceeded through the 'textbook' legislative process (first passing through committees on each side, then moving to debate and vote in each chamber, followed by conference between the chambers, and concluding with a final vote by both chambers before passage)." *Id.*

124 *See* Laschler, *supra* note 118, at 508–09 (noting the practical difficulties of assessing informal and outside deliberation).

B. *Cautions and Assumptions*

Before analyzing the case studies, it is important to recognize some limitations inherent in analyses of legislative action. While this research of legislative engagement into the constitutionality of a law and the validity of a judicial decision will result in certain conclusions about the model of judicial review that best promotes dialogue, these conclusions are limited by other factors that can also influence the level of dialogue and the quality of the case studies' analysis. The first issue that will limit the conclusions of the analysis is the nature of legislative debate itself. Although floor debate is where the deliberation is supposed to occur, deliberation and negotiation often occur behind closed doors and away from the public eye. This private debate occurs not just between legislators themselves, but also between legislators and their staff or outside consultants. In addition, public debate can be limited by procedural rules, often instigated at the behest of an imposing political party, that force the debate private. Therefore, it is possible that even though there was little public debate over the constitutionality of a law, there could have been a vibrant private debate that created a meaningful dialogue.[125]

In addition, in the case of legislative review of court decisions overriding past legislative acts, the subject matter of the statute at issue is likely to affect how involved the legislature will be.[126] Indeed, Robert Dahl has found that despite judicial invalidation of legislation, the U.S. Congress has generally found ways of overcoming this invalidation to achieve their goals on

[125] Although this would create meaningful internal dialogue that would help support the benefits of judicial review, private debate has its limitations. For example, if the issue was to return once again to the courts, they would not have any guidance if the deliberative process was opaque because all of their reasonings were made in private. *Cf.* Aileen Kavanagh, *Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory*, 34 OXFORD J. LEGAL STUD. 443, 478–79 (2014) (finding a trend in the U.K. whereby courts have begun to "take the quality of the legislative decision-making process into account when assessing whether legislation is compatible with [HRA] rights.").

[126] *See* Lascher, *supra* note 118, at 511–12 (because legislators face the problem of "too many decisions and too little time to make them . . . they cannot deliberate about everything" and the level of deliberation will vary "in part [by] the nature of the issue.").

policies that they considered to be important.[127] In particular, it is possible that the legislature will become significantly more involved in the legal debate if the court overruled a statute that affected the legislature's own power. From the U.S. perspective, one of the most prominent examples of this was the battle for laws regulating child labor during the early 20th century.[128] Congress' first attempt to regulate child labor was with the Keating-Owen Child Labor Act of 1916 through its power to regulate interstate commerce.[129] The U.S. Supreme Court overturned this law in *Hammer v. Dagenhart* because the Court found that Congress had exceeded its commerce power.[130] Congress tried to evade the decision by passing a similar act based on Congress' taxing power, but the Supreme Court invalidated that as well.[131] Finally, in 1938, Congress passed the Fair Labor Standards Act that again regulated child labor based on Congress' commerce power.[132] An amenable Supreme Court upheld this act in 1941.[133] This legal battle is interesting because most states already had child labor laws when *Dagenhart* was decided and there was not a popular backlash against the *Dagenhart* decision that would have propelled Congress to engage for political reasons.[134] Given that these factors were missing, it seems plausible that Congress engaged so substantially on the issue because they disagreed with the Court's view of congressional power.

Whichever political party controls is also likely to affect the level of legislative engagement. For example, imagine that Party

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127 Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 287–88 (1957) (collecting cases and finding that Congress was able to "reverse [the] Court's policy" in ten of fifteen cases that revolved around "major policy"—excluding the New Deal cases).

128 *See* Mark E. Herrmann, *Looking Down from the Hill: Factors Determining the Success of Congressional Efforts to Reverse Supreme Court Interpretations of the Constitution*, 33 WM. & MARY L. REV. 543, 547–68 (1992) (describing Congress' attempts to regulate child labor).

129 Act of Sept. 1, 1916, ch. 432, Pub. L. No. 249, 39 Stat. 675 (overturned by Hammer v. Dagenhart, 247 U.S. 251, 277 (1918)).

130 Hammer v. Dagenhart, 247 U.S. 251, 277 (1918).

131 *See* Bailey v. Drexel Furniture Co., 259 U.S. 20, 44 (1922).

132 Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. ch. 676.

133 United States v. Darby, 312 U.S. 100, 125 (1941).

134 Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821, 849 (2005).

A passes a law. If by the time the courts override it and the issue returns to the legislature, Party B is in power, then the legislature might be less inclined to involve themselves in the issue because they do not support the statute the same way that Party A supported the statute. An analogous example is the legal battle over the constitutionality of the Patient Protection and Affordable Care Act ("Obamacare"). In 2018, Texas and nineteen other states sued the U.S. in federal district court arguing that Obamacare was unconstitutional.[135] The U.S. government, then under Republican leadership, decided that it would not defend Obamacare in court; presumably because in contrast to the Democratic administration that passed and championed the Act, the Republican administration did not support the Act.[136] This demonstrates how the changing of political power can possibly affect the level of political engagement in support of a statute. Similarly, studies have found that there is greater legislative debate when the issue is not politically divisive.[137]

The level of judicial entrenchment may also affect the level of legislative engagement. In a new democracy, where the court has not had the requisite time to establish its role and validity, overturning a statute might result in more legislative engagement, whereas with a strong and established court, the legislature might be less inclined to get involved. Take, for example, the Peruvian Constitutional Tribunal and its third-term ruling.[138] In 1997, only one year after the tribunal's creation, it

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[135] *See generally* Complaint for Declaratory and Injunctive Relief, Texas v. United States, 340 F. Supp. 3d 579 (2018) (4:18-cv-00167-O) (arguing that the individual mandate of the ACA is unconstitutional because the Tax Cuts and Jobs Act of 2017 removed the tax penalty from the individual mandate and therefore it is no longer an exercise of Congress' taxing power).

[136] *See* Ariane de Vogue & Tami Luhby, *Federal Judge in Texas Strikes Down Affordable Care Act*, CNN (Dec. 15, 2018), https://www.cnn.com/2018/12/14/politics/texas-aca-lawsuit/index.html.

[137] *See* André Bächtiger et al., *The Deliberative Dimensions of Legislatures*, 40 ACTA POLITICA 225, 234 (2005).

[138] *See* Eduardo Dargent, *Determinants of Judicial Independence: Lessons From Three 'Cases' of Constitutional Courts in Peru (1982-2007)*, 41 J. LATIN AM. STUD. 251, 269–70 (2009) (discussing the Peruvian Constitutional Tribunal case). Similar examples in Latin America include court-packing by President Menem of Argentina, *see e.g.*, Mugambi Jouet, *The Failed Invigoration of Argentina's Constitution: Presidential Omnipotence, Repression, Instability, and Lawlessness in Argentina History*, 39 UNIV. MIAMI INTER-AM. L. REV. 409, 446 (2008); court-

ruled that Congress' interpretation of the Constitution that allowed President Alberto Fujimori to run for a third term was unconstitutional.[139] In response to this ruling, Congress voted 52-33 to dismiss the three judges who had issued the ruling.[140] They based the removal on an allegation that the three judges had exceeded their power by signing a document on behalf of the full court.[141]

In addition to possibly increased legislative engagement of judicial review in new democracies, courts in these countries might also be less willing to overturn statutes in the first place for fear of damaging their already vulnerable positions. Chilean courts, for example, have been very modest in their use of judicial review, in part because when they have gotten involved in political issues, the result has been catastrophic.[142] When the Chilean Supreme Court ruled in 1927 that the arrest of the Minister of Interior by the Minister of Defense was illegal, the Minister of Defense arrested the President of the Supreme Court and removed half of the Court's members.[143] Given the ambiguities and erratic role that courts may have in new democracies and the effect this may have on legislative engagement, the analysis presented here will focus on established democracies.

Lastly, other parties outside of the legislature and judiciary can also potentially affect the level of legislative engagement. For example, the level of media interest in an issue could potentially spur legislative engagement when there otherwise might not have been engagement. Between 1990 and 1991, the media in the U.K. went into a frenzy reporting about incidents of dogs mauling people and demanded that something be done by

packing (and purging) by President Hugo Chavez in Venezuela, *see, e.g.*, *Rigging the Rule of Law: Judicial Independence Under Siege in Venezuela*, HUMAN RIGHTS WATCH (Jun. 16, 2004), https://www.hrw.org/report/2004/06/16/rigging-rule-law/judicial-independence-under-siege-venezuela#.

139 Dargent, *supra* note 138, at 269–70.

140 Calvin Sims, *Peru's Congress is Assailed Over Its Removal of Judges*, N.Y. TIMES (May 31, 1997), https://www.nytimes.com/1997/05/31/world/peru-s-congress-is-assailed-over-its-removal-of-judges.html.

141 *Id.*

142 Javier Couso, *The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990–2002*, 10 DEMOCRATIZATION 70, 87–89 (2003).

143 *Id.* at 85–86.

the Government to address the problem.[144] In response, the U.K. Parliament passed the Dangerous Dogs Act.[145] The Act is considered by many to be poorly designed, overbroad, and an "archetypal piece of knee-jerk nonsense."[146] Similarly, significant lobbying can spur the legislative branch into action and distort legislative opinions on the issue.[147] The level of engagement from the executive branch may also affect how involved the legislature becomes. For example, if the executive branch was the one to initially propose and draft the legislation in question, the executive branch will be more invested in ensuring its continued validity. If the executive branch is more involved, it is possible that the legislative branch will be more involved, especially the members in the legislature of the executive's own party.[148] Having considered the various limitations inherent in our analysis of legislative engagement of judicial review, the next section will cover the four principal case studies and draw conclusions from them.

IV. CASE STUDIES

This section uses three countries as case studies to analyze whether weak-form judicial review provides its purported dialogic benefit. Two case studies have strong-form judicial review—the U.S. and India—and one case study has weak-form judicial review, the U.K. This article chose both strong-form and weak-form systems to demonstrate whether weak-form judicial review creates a worthwhile increase in meaningful dialogue over

144 Iain Hollingshead, *Whatever Happened to Dangerous Dogs?*, GUARDIAN (Nov. 4, 2005), https://www.theguardian.com/uk/2005/nov/05/animalwelfare.world.

145 *See* Hollingshead, *supra* note 144; Dangerous Dogs Act 1991, c. 65 (Gr. Brit.).

146 Hollingshead, *supra* note 144 (The Act is considered "a classic example of what not to do.").

147 *Cf.* Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L. J. 371, 377 (1987) ("It is well known that technocrats, lobbyists and attorneys have created a virtual cottage industry in fashioning legislative history so that the Congress will appear to embrace their particular view in a given statute.").

148 *See, e.g.*, Argelin Cheibub Figueiredo & Fernando Limongi, *Presidential Power, Legislative Organization, and Party Behavior in Brazil*, 32 COMPAR. POL. 151, 151 (2000) (analyzing empirical data and finding that Brazilian presidents' own proposed legislation is most often successful because the president's party has a high level of discipline).

strong-form judicial review.[149]

The particular cases were chosen while keeping in mind the "most similar cases" principle outlined by Ran Hirschl.[150] This principle suggests selecting cases that "are matched on all variables or potential explanations that are not central to the study, but vary in the values on the key independent and dependent variables."[151] In so doing, the selected cases can help "isolat[e] the explanatory power of the key independent variable"—here, whether the country has adopted a system of strong- or weak-form judicial review.[152]

In terms of non-key variables, the particular country case studies were chosen because they are all generally considered to be established democracies.[153] This article omitted less established democracies and countries because, as previously mentioned, the judicial and legislative branches might act differently than in established democracies.[154] In addition, the

149 The analysis does not assess a particular country before and after implementing weak-form judicial review because the countries with weak-form judicial review came from systems of legislative supremacy with allegedly more legislative engagement on the issues, and thus the change over time does not speak as strongly to whether switching to weak-form judicial review improves constitutional dialogue.

150 *See* Hirschl, *supra* note 110, at 133–34.

151 Hirschl, *supra* note 110, at 134.

152 Hirschl, *supra* note 110, at 134.

153 *See* Economist Intelligence Unit, *Democracy Index 2020: In sickness and in Health,* EIU (2020), https://www.eiu.com/n/campaigns/democracy-index-2020/?utm_source=economist-daily-chart&utm_medium=anchor&utm_campaign=democracy-index-2020&utm_content=anchor-1 (last visited Dec. 4, 2021). The Democracy Index measures the state of democracy around the world and categorizes countries as full democracies, flawed democracies, hybrid regimes, or authoritarian regimes. *Id.* In 2020, all four countries were considered democracies: India was ranked 53rd, the U.S. was ranked 25th, and the United Kingdom was ranked 16th. *Id.* at 8–10, Also, established democracies often provide a greater sample size in the number of times legislatures convene and substantively engage in the policymaking process, and therefore provide a better indicator of the dialogic benefit of the various forms of judicial review. *Cf.* Jennifer Gandhi, Ben Noble, & Milan Svolik, *Legislatures and Legislative Politics Without Democracy*, 53 COMPAR. POL. STUD. 1359, 1360 (2020) (noting empirical evidence that suggests that "authoritarian legislatures meet less frequently; when they do meet, it is often for ceremonial purposes," and that legislators in authoritarian regimes are not often involved in activities related to the policymaking process).

154 *Compare* Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. OF TRANSNAT'L L. 285, 285 (2015)

chosen cases within each country mostly address statutes enacted by the legislative branch that the judicial branch subsequently interpreted as an unlawful violation of a provision of the bill of rights. The article chose this control because the weak-form model of judicial review is currently only used to review legislation for infringement upon delineated rights and liberties.[155] As a result, cases wherein the judicial branch interpreted either statute as unlawfully infringing on other constitutional issues or solely executive actions as infringing on the bill of rights were not included.

In terms of key variables, these countries were chosen because they provide an inclusive spectrum of the strength of the judicial branch, from strongest to weakest. India has one of the strongest judicial branches in the world, with the ability to declare constitutional amendments unconstitutional, whereas the judicial branch's power in the U.K. to make declarations of incompatibility is relatively new and the courts have historically been rather weak.[156] This spectrum will allow deeper investigation into the dialogic benefit of weak-form judicial review and whether this benefit can change based on the particular variety of weak-form judicial review selected by a country. Further, the particular cases selected for each country attempt to incorporate a spectrum of legislative responses, including overriding the court's decision, accepting the court's decision, and slightly modifying the suspect statute.[157] The article turns first to the United States.

(discussing backlashes against courts in several new democracies and arguing that adopting weak-form judicial review might ease the political tension and help develop judicial independence), *with* Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606, 606–07 (2015) (arguing that where a dominant political party is using constitutional amendments to retain its hold on power, a "super-strong" form of judicial review might be warranted).

155 Gardbaum, *supra* note 154, at 313.

156 *See* Gardbaum, *supra* note 154, at 305.

157 Although this article had to make decisions on which cases to include/exclude because of the inherently limited scope of the article, choosing cases with a spectrum of legislative responses attempts to mitigate possible flaws due to cherry-picking.

A. *United States*

It is widely accepted that the United States has a system of strong-form judicial review; however, this does not necessarily preclude dialogue between the branches of government.[158] Decisions of the U.S. Supreme Court bind current and subsequent parties before it, including when that party is the U.S. government.[159] This is generally because the Constitution is authoritative in the sense that citizens and officials alike must not only obey provisions of the Constitution they believe to be misguided but also interpretations of the Constitution that they believe to be misguided.[160] Despite the strength of the judiciary, it is also widely argued that the U.S. has a system of departmentalism wherein other political actors, having taken an oath to support and defend the Constitution, have a duty to make their own independent interpretations of the Constitution.[161] Numerous Presidents have also taken this view, such as Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and Ronald Reagan.[162] Possibly acknowledging this departmentalism, the U.S. Supreme Court has created numerous mechanisms, such as the political question doctrine, through which the Court can restrain its decisions and leave room for legislative engagement.[163] Similarly, not all Supreme Court decisions are immune from statutory reversal.

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158 *See* Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2784 (2003).

159 *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (asserting that the Supreme Court's interpretations bind all officials).

160 *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1361–62 (1997).

161 *See id.*

162 Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1138 n.2 (2011).

163 *See* Nixon v. United States, 506 U.S. 224, 228–29 (1993) (explaining that there are constitutional issues "committed" to the executive or legislative branches of government, as opposed to the judicial branch); *see also* Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L. J. 1, 4 (2016) (noting that by using avoidance strategies, courts can create a delay which may allow for dialogue among the political branches). *But see* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1936–37 (2015) (arguing that the political question doctrine is used by the Supreme Court to solidify its supremacy over constitutional law by allowing itself to declare which branch of government can decide which constitutional question).

Professor Henry Monaghan argued that the Supreme Court created a "constitutional common law" of "substantive, procedural, and remedial rules" that are not constitutionally required and are therefore modifiable by the legislature.[164] The legislature has often acknowledged its role in constitutional interpretation as well. For example, the U.S. House of Representatives has required that, when passing a bill of joint resolution, Congress include a "Constitutional Authority Statement" that declares which constitutional power Congress is acting upon in passing the legislation.[165] This requirement is considered to be "fundamentally a congressional interpretation of the Constitution."[166] This in turn allows a certain level of dialogue over constitutional law to occur between the judiciary and the other political branches. Having established the possibility for dialogue in models of strong-form judicial review, congressional engagement in two Supreme Court rulings, *U.S. v. Stevens*[167] and *Citizens United v. F.E.C.*,[168] will now be analyzed.

1. Animal Crush Videos

In 1999, the U.S. Congress enacted into law 18 U.S.C. § 48 which made it a crime punishable by up to seven years in prison to commercially create, sell, or possess a depiction of animal cruelty.[169] The law was apparently enacted to prohibit animal "crush videos," often made for persons with an obscure sexual fetish, wherein animals were depicted getting crushed by the bare foot or heel of a woman.[170] "Depiction of animal cruelty," however, was defined as a depiction "in which a living animal is

164 Henry Monaghan, Forward, *Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975); *see also* YAP, *supra* note 72, at 79–106 (illustrating how courts in Hong Kong, Malaysia, and Singapore can engage in constitutional dialogue with the legislature through sub-constitutional norms).

165 CONG. RSCH. SERV., R44729, CONSTITUTIONAL AUTHORITY STATEMENTS AND THE POWER OF CONGRESS: AN OVERVIEW (2019).

166 *Id.*

167 United States v. Stevens, 130 S. Ct. 1577 (2010).

168 Citizens United v F.E.C., 130 S. Ct. 876 (2010).

169 18 U.S.C. § 48(a)–(b). (*Invalidated by* U.S. v. Stevens, 130 S. Ct. 1577 (2010)).

170 *See Stevens*, 130 S. Ct. 1577, 1579 (2010) (discussing the legislative history and intent behind the legislation).

intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State."[171] The law did not apply to depictions with "serious religious, political, scientific, educational, journalistic, or artistic value."[172] Although successful at limiting the animal crush video market, in 2010, the U.S. Supreme Court held that the law was invalid under the First Amendment because it was overbroad, applying to more protected speech than was necessary to fulfill the statute's purpose.[173] For example, the law could apply to hunting videos that were made for entertainment and sold in the District of Columbia, where hunting is illegal.[174] Despite finding the statute invalid, the Supreme Court implied the possibility that a ban on only animal crush videos would be constitutional.[175]

In May 2010, shortly after the Supreme Court decision, the U.S. House of Representatives Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security held a hearing to discuss possible legislative responses.[176] Interestingly, the panelists included not only constitutional scholars and practitioners but also two congressmen. Congressman Gary Peters (D-MI), who had recently introduced a replacement animal crush bill, mentioned in his opening statement how the Supreme Court decision "left Congress very little room to regulate" and that Congress "must enact a new narrowly tailored legislation that carefully parses and responds to Chief Justice Roberts' opinions and can survive another round of judicial review."[177] He noted that to make the legislation constitutional, the new bill must be constrained to ban only animal crush videos and the exceptions clause must be broadened.[178] After Congressman Peters' introductory remarks, Congressman Elton Gallegly (R-CA) similarly discussed the need

171 *Id.* at 1582.

172 *Id.* at 1590.

173 *Stevens*, 130 S. Ct. at 1592.

174 *Id.* at 1589.

175 *Id.* at 1592.

176 *United States v. Stevens: The Supreme Court's Decisions Invalidating the Crush Video Statute: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2010).

177 *Id.* at 4 (statement of Gary C. Peters, Sen. from the State of Michigan).

178 *Id.* at 5.

for a narrowly tailored replacement. In addition, he remarked: "while I was disappointed with the Court's ruling, I have tremendous respect for the Court."[179] Once the hearing was opened up for questioning, Louie Gohmert (R-TX) asked several questions probing where a future court could ostensibly find "loopholes" that might make the law overbroad.[180] For example, he asked whether the interstate commerce provision was too broad and expressed concern over the lack of a definition for "animal."[181] Following the panel with Representatives Gallegly and Peters, the Subcommittee heard from several constitutional law scholars and practitioners who argued that crush videos would likely fit within the definition of obscenity and therefore fall outside the First Amendment's protection.[182]

Following the hearing, on June 22, 2010, H.R. 5566 was introduced in the House. A mark-up session and debate were largely uneventful. Most representatives simply mentioned that this bill "carefully parses and responds" to the Supreme Court's decision[183] and that it will pass constitutional muster because it only bans animal cruelty that is "obscene" and specifically exempts depictions of protected categories, such as hunting.[184] Congressman James Moran (D-VA) mentioned how he disagreed with the Supreme Court's decision but did not provide clarification for his reasoning.[185]

Following passage in the House, H.R. 5566 (now S7653) was debated and amended in the U.S. Senate. The Senate version contained notable changes; it specifically defined animal, criminalized conspiracy to produce animal crush videos, and separated the definition of a depiction of animal crush into (1) intentional serious bodily injury to animal and (2) obscenity.[186]

179 *Id.* at 25 (statement of Rep. Elton Gallegly).

180 *Id.* at 24–25 (statement of Rep. Louie Gohmert).

181 *Id.*

182 *See*, *United States v. Stevens: The Supreme Court's Decisions Invalidating the Crush Video Statute: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 19–64 (2010).

183 111 CONG. REC. H5790 (daily ed. Jul. 20, 2010) (statement of Rep. Gary Peters).

184 *Id.* at H5789 (daily ed. Jul. 20, 2010) (statement of Rep. Bobby Scott).

185 *Id.* at H5790 (daily ed. Jul. 20, 2010) (statement of Rep. Jim Moran).

186 111 CONG. REC. S7654 (daily ed. Sept. 28, 2010) (amendment No. 4668 as agreed to by the Senate).

During the Senate debate, Senator Patrick Leahy (D-VT) mentioned that, although Congress finds many animal crush videos to be obscene, the definition of depiction of animal crush was bifurcated to "respect the role that courts and juries play in determining obscenity."[187] Despite this, the bill nevertheless contained a congressional finding that "many animal crush videos are obscene in the sense that the depictions, taken as a whole—(A) appeal to the prurient interest in sex; (B) are patently offensive; and (C) lack serious literary, artistic, political, or scientific value."[188] This finding tracks the test for obscenity laid out by the Supreme Court in *Miller v. California*.[189]

When H.R. 5566 returned to the House, the House accepted most of the amendment but removed the criminalization of a conspiracy or attempt to create animal crush videos.[190] During the congressional debate, Congressman John Conyers (D-MI) expressed his concerns for the change by noting that criminalizing attempts or conspiracies to create animal crush videos is "particularly problematic with respect to the creation of expressive materials, no matter how little redeeming value they may have" because the "materials . . . may or may not turn out to be obscene."[191] After Congress reached a final agreement, President Obama signed the Animal Crush Video Prohibition Act of 2010 into law on December 9.[192]

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187 *Id.* at S7653.

188 *Id.* at S7654 (amendment No. 4668 as agreed to by the Senate).

189 *See* Miller v. California, 413 U.S. 15, 26 (1973) ("[a]t a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection").

190 *Compare* 111 CONG. REC. S7654 (daily ed. Sept. 28, 2010) ("It shall be unlawful for any person to knowingly create an animal crush video, *or to attempt to conspire to do so*, if") (emphasis added), *with* H.R. 5566, 111th Cong. § 3 (2010) ("It shall be unlawful for any person to knowingly create an animal crush video, if").

191 111 CONG. REC. H7404 (daily ed. Nov. 15, 2010) (statement of Rep. John Conyers).

192 Press Release, The White House, Statement by the Press Secretary (Dec. 9, 2010), https://obamawhitehouse.archives.gov/the-press-office/2010/12/09/statement-press-secretary.

2. Corporate Campaign Finance

Standing in stark contrast to the bipartisan and uncontroversial topic of animal crush videos is the debate about campaign finance laws that followed in the wake of the U.S. Supreme Court's decision in *Citizens United v. F.E.C.*, 558 U.S. 310 (2010).[193] The *Citizens United* decision, a five-to-four ruling, removed certain restrictions on the ability of corporations and other business entities to use their general treasury funds to finance communications expressly advertising the election or defeat of a certain candidate for political office.[194] The Court held that two provisions of the Federal Election Campaign Act, the prohibition on corporations using general treasury funds for independent expenditures and electioneering communications, constitute a "ban on speech" thus violating the First Amendment.[195] The congressional response was dramatic.

The day that the Court issued its ruling, Senators Jeff Sessions (R-AL) and Ted Kaufman (D-DE) exchanged statements on the Senate floor outlining their views.[196] Senator Sessions agreed with the Court's reasoning in its issued opinion, concurring that the decision was consistent with the Founding Fathers' ideals in the way it "overruled two recent precedents that had themselves undermined and were inconsistent with this Nation's long tradition of protecting political speech."[197] He also mentioned that the decision was useful in that it showed "how far some congressionally passed laws reach," and continued "that sometimes these bills reach farther [sic] than we [Congress] intended for them to reach when [Congress] wrote them."[198] In contrast, Senator Kaufman decried the decision. His primary concern was that an activist court issued the opinion that blatantly violated stare decisis.[199] Senator Kaufman also expressed concerns that the ruling was too broad and that the

193 Citizens United v. F.E.C., 558 U.S. 310, 372 (2010).

194 *Id.* at 310.

195 *Id.* at 312.

196 111 CONG. REC. S108-09 (daily ed. Jan. 21, 2010).

197 111 CONG. REC. S108-09 (daily ed. Jan. 21, 2010) (statement of Sen. Jeff Sessions).

198 *Id.* (statement of Sen. Jeff Sessions).

199 *Id.* at S117 (daily ed. Jan. 21, 2010) (statement of Sen. Ted Kaufman).

Court could have restricted its decision to not-for-profit political advocacy firms.[200] Lastly, he remarked that the decision erodes public trust in the government because "undiluted corporate money [can] drown out the voices of individual citizens and corrupt the political process."[201]

Following these initial remarks, Democrats opposed to the decision issued floor statements that became increasingly critical of the Court. For example, Senator Patrick Leahy (D-VT) remarked that he was "disappointed with the Justices," in that they "went beyond the proper judicial role to substitute their preferences for the law," and charged that several Justices were not abiding by the statements they made under oath to the Senate Judiciary Committee.[202] Senator Sheldon Whitehouse (D-RI) concurred with several of the remarks made by Senator Leahy, adding that the decision ignores the Founding Fathers' original intent and that the Court ignored its proper role by engaging in fact-finding and writing in a polemical, rather than judicial tone.[203]

In addition to floor statements, six hearings discussing the implications and possible congressional responses to the Supreme Court ruling were held during the 111th Congress.[204] Most of these hearings, however, focused on possible legislative responses within the bounds of the *Citizens United* decision. Although legislators voiced their opinion on the Court's decision during the hearings, especially during their opening statements, they did so in broad terms, usually explaining either that political speech is the most sacred kind of speech and that Congress should not pass any law abridging the right to free speech, or that speech can be regulated by Congress when it is so required. Some also argued that corporations are not persons and that keeping corporate money out of elections is an essential goal.[205]

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200 *Id.* (statement of Sen. Ted Kaufman).

201 *Id.* (statement of Sen. Ted Kaufman).

202 111 CONG. REC. S275 (daily ed. Jan. 28, 2010) (statement of Sen. Patrick Leahy).

203 111 CONG. REC. S354–55 (daily ed. Jan. 29, 2010) (statement of Sen. Sheldon Whitehouse).

204 H.R. Rep. No. 111–492, at 24 (2010).

205 *Compare Defining the Future of Campaign Finance in an Age of Supreme Court Activism: Hearings Before the Comm. on H. Admin.*, 111th Cong. 2-4 (2010)

One exception was Congressman Mel Watt (D-NC), who explicitly declared that he was undecided on whether he agreed with *Citizens United* and that he hoped to "have a more fixed opinion" after listening to the panel witnesses.[206] In particular, he noted that he wanted to hear from the witnesses on whether corporations are people and whether money is speech.[207] It is unclear if Congressman Watt was convinced one way or the other about the issue.[208]

After these floor statements and hearings on the issue, Representative John Yarmuth (D-KY), along with twenty-seven Democratic cosponsors, introduced a resolution "[e]xpressing disapproval of the decision issued by the Supreme Court in *Citizens United v. Federal Election Commission*."[209] In particular, the resolution found that the decision was incorrect because it "allow[ed] the interests of corporations . . . to supersede the voices of citizens of the United States in the democratic process . . . and ha[d] a corrosive effect on the electoral process, the cornerstone of democracy in the United States, by separating the people from their elected representatives."[210] The resolution further called on Congress to work in a bipartisan manner to "limit the influence" of corporations in federal elections.[211] Although the bill never left committee, there were numerous efforts to limit the influence of the court's decision.

(statement of Sen. Dan Lungren),

with id. at 5–6 (statement of Rep. Zoe Lofgren).

206 *First Amendment and Campaign Finance Reform After Citizens United: Hearing Before the Subcomm. on the Const., C.R., and C.L., of the H. Comm. on the Judiciary*, 111th Cong. 8 (2010) (statement of Rep. Melvin Watt).

207 *Id.* at 7.

208 The only indications on Congressman Watt's final view on the issue are his subsequent votes on campaign finance legislation in the 111th Congress. From this imperfect perspective, it appears he sided with the Court; for example, he voted "Nay" on the DISCLOSE Act. Roll Call 391, H.R. Res. 5175, 111th Cong. (June 24, 2010), https://clerk.house.gov/evs/2010/roll391.xml.

209 H.R. Res. 1275, 111th Cong. (2010); Cosponsors: H.Res.1275—111th Congress (2009-2010): Expressing disapproval of the decision issued by the Supreme Court in Citizens United v. Federal Election Commission, https://www.congress.gov/bill/111th-congress/house-resolution/1275/cosponsors?r=43&s=1.

210 *Id.*

211 *Id.*

In particular, more than forty bills were introduced during the 111th Congress that dealt with corporate campaign finance regulation.[212] Some of this legislation attempted to act within the bounds of the court's decision by, for example, requiring increased disclosures and disclaimers by corporations and other entities engaged in independent expenditures and electioneering communications.[213] Other legislation was likely aimed at circumventing *Citizens United* by creating campaign finance regulations that, read explicitly, would not violate the law as set forth by the Supreme Court, but the effect would be to impose the same speech restrictions as were in effect before the Court's decision.[214] Additionally, during the 111th Congress, six constitutional amendments related to campaign finance were introduced after *Citizens United*.[215] These proposals differed in substance, ranging from permitting Congress and the states to limit political expenditures to prohibiting corporations from funding advertising related to federal elections.[216] Other than the

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[212] R. Sam Garret, CONG. RSCH. SERV., R41054 CAMPAIGN FINANCE POLICY AFTER CITIZENS UNITED V. FEDERAL ELECTION COMMISSION: ISSUES AND OPTIONS FOR CONGRESS (2011).

[213] *See, e.g.*, Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. 5175, 111th Cong. (2010) (passed in House by a vote of 219-206); S. 3295, 111th Cong. (2010) (Senate version that did not gain the requisite vote for the cloture motion to succeed). *But see "We The People? Corporate Spending in American Elections After Citizens United" Hearing Before the S. Comm. on the Judiciary*, 111th CONG. 5–6 (2010) (statement of Bradley A. Smith) (arguing that even many of the provisions of the DISCLOSE Act would be unconstitutional under *Citizens United*).

[214] *See, e.g.*, H.R. 4431, 111th Cong. § 4491(a) (2010) (levying a 500% tax on corporate campaign contributions or electioneering communications); H.R. 4487, 111th Cong. § 2 (2010) (requiring approval from majority of shareholders before spending corporate funds on political advocacy not related to the company's business).

[215] H.R.J. Res. 68, 111th Cong. (2010); H.R.J. Res. 74, 111th Cong. (2010); H.R.J. Res. 84, 111th Cong. (2010); H.R.J. Res. 82, 111th Cong. (2010); S.J. Res. 28, 111th Cong. (2010); S.J. Res. 36, 111th Cong. (2010).

[216] *Compare* H.R.J. Res. 74, 111th Cong. (2010)

> Article–Section 1. The sovereign right of the people to govern being essential to a free democracy, Congress and the States may regulate the expenditure of funds for political speech by any corporation, limited liability company, or other corporate entity. Section 2. Nothing contained in this article shall be construed to abridge the freedom of the press.,

with H.R.J. Res. 68, 111th Cong. (2010)

DISCLOSE Act, which was passed in the House but failed in the Senate, none of these proposals from the 111th Congress got far in the legislative process, with almost all of them stalling in committee.[217] The debate, however, has not stopped. Numerous pieces of legislation and proposals to amend the Constitution have come in subsequent Congresses, and many legislators are still fighting on this issue to this day.[218]

B. *India*

India provides another unique case study to examine legislative engagement on constitutional questions brought up by the judiciary because "the Supreme Court of India is arguably one of the most assertive and powerful high courts" in the world.[219] Several factors contribute to this power. First, the Supreme Court has declared that although the legislature has the power to alter fundamental rights through constitutional amendments, the Court has the power to declare constitutional amendments unconstitutional if they violate the basic structure of the Constitution as originally conceived.[220] Second, the Supreme

> Article–No corporation or labor organization may use any of its operating funds or any other funds from its general treasury to make any payment for any advertisement in connection with a campaign for election for federal office, without regard to whether or not the advertisement expressly advocates the election or defeat of a specified candidate in the election.

[217] *See generally* Brennen Center for Justice, *Summary of Federal Election Reform Legislation Introduced in the 111th Congress*, https://www.brennancenter.org/sites/default/files/analysis/Summary%20of%20Election%20Reform%20Legislation%20111th%20Congress.pdf (last modified Jun. 7, 2010).

[218] *See, e.g.*, H.R. Res. 1, 117th Cong. (2021) ("For the People Act of 2021" aimed at, *inter alia*, "reduc[ing] the influence of big money in politics").

[219] Manoj Mate, *The Rise of Judicial Governance in the Supreme Court of India*, 33 B.U. INT'L L. J. 169, 171 (2015); *see also* Manish Tewari & Rekha Saxena, *The Supreme Court of India: The Rise of Judicial Power and the Protection of Federalism*, *in* COURTS IN COUNTRIES: FEDERALIST OR UNITARISTS? 223, 224 (Nicholas Aroney et al eds., 2017) (discussing how the strength of the judiciary in India is in part "due to the emergence of divided governments produced by India's immense cultural, regional, and social diversities and the rise of a state-based multiparty system").

[220] *See* CHINTAN CHANDRACHUD, BALANCED CONSTITUTIONALISM: COURTS AND LEGISLATURES IN INDIA AND THE UNITED KINGDOM 46–47 (2017) (referencing Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461 (1973) (India))

Court created public interest litigation (PIL), wherein an individual with no particular interest in the litigation can file a petition claiming certain rights have been violated, which the Court will grant if there is a large public interest at stake.[221] These petitions are usually directed at "government illegality and statutory noncompliance," often in the context of human rights abuses.[222] As a result of the basic structure doctrine and PIL, the Court has asserted itself into traditionally legislative or executive arenas. For example, the Court has secured control over judicial appointments, interfered in governmental corruption investigations, and developed policy decisions in topic areas ranging from environmental policy to education.[223] Despite the judiciary's strength, the legislature still wields power that gives it opportunities to potentially engage in dialogue with the courts. Under Article 368 of the Indian Constitution, the legislature may amend the Constitution with a majority vote of each of the Houses wherein at least two-thirds of each House are present at the vote.[224] This amendment power can be used to alter fundamental rights so long as they do not alter the Constitution's basic structure.[225] In addition, the legislature, through Article 31B and with the majority requirements for a constitutional amendment, can put legislation in the "Ninth Schedule."[226] Acts in the Ninth Schedule apply even if they are found to conflict with other fundamental rights found in Part III of the Constitution.[227] Although both of these amendment processes are still restricted by the basic structure of the Constitution, they nevertheless provide a means for the legislature to respond to the

(although not precisely defined, subsequent cases have illuminated that the following concepts are part of the basic structure of the Constitution: "the supremacy of the Constitution, secularism, the sovereignty of India, federalism, judicial review, the limited power to amend the Constitution, and free and fair elections").

221 *See* Manoj Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT'L L. J. 175, 191–209 (2010).

222 *Id.* at 191, 196.

223 *Id.* at 177.

224 India Const. art. 368, cl. 2.

225 *Id.*

226 India Const. art. 31B.

227 *Id.*

judiciary in a country with one of the strongest high courts in the world.[228]

1. Election Disclosures

In response to a growing body of evidence indicating high levels of corruption in the Indian government, media and civil society groups led a push for electoral and governmental accountability reforms.[229] Prodded by this movement, the government undertook a study to investigate possible reforms to "mak[e] the electoral process more fair, transparent, and equitable . . . [a]nd to reduce . . . the . . . distortions and evils that crept into the Indian electoral system"[230] The result was a report by the Law Commission of India that recommended, *inter alia*, that candidates for public office be required to disclose financial assets and prior criminal records.[231] When the government failed to implement these measures, the Association for Democratic Reforms filed a PIL claim in Delhi High Court asking it to direct the Election Commission (EC) to implement the recommendations of the Law Commission report.[232] The case eventually reached the Indian Supreme Court, where the Court ruled in May 2002 that voters had a right to this information and reiterated that the court had the power to issue directions to the EC until the legislature stepped in and passed a satisfactory law.[233] In so holding, the court equated the fundamental right of freedom of speech and expression found in Article 19(1) of the Indian Constitution with the "right to know," establishing that voting is a type of speech and votes cast by uninformed voters would be "meaningless" and thus would not satisfy the freedom of speech guarantees.[234] As a result, the EC was required to

228 *See generally* CHANDRACHUD, *supra* note 220, at 31–58 (discussing fundamental rights amendments and Ninth Schedule amendments and their use in responding to the courts).

229 Mate, *supra* note 221, at 192.

230 Law Comm'n of India, *Reform of the Electoral Laws*, Report No. 170 (May 1999).

231 *Id.*

232 *See* Mate, *supra* note 221, at 193.

233 Union of India v. Ass'n for Democratic Reforms, (2002) 5 S.C.C. 294, 12, 14 (India).

234 *Id.* at 16.

implement certain disclosure requirements at the outset of a candidate's nomination for election, namely: (1) past convictions, acquittals, discharges, and pending criminal cases; (2) assets and liabilities of the candidate and his or her family; and (3) educational qualifications.[235]

With nearly all political parties opposed to the court's decision, the government began to analyze possible responses, and the Ministry of Law and Justice undertook "wide-ranging consultations with all the political parties."[236] After allegedly reaching consensus, the President promulgated an ordinance on August 24, 2002, that claimed to override much of the court's decision.[237] After this promulgation, the Lok Sabha took up the issue of passing a law to formalize many aspects of the President's ordinance.[238]

A debate on the proposed bill in the Lok Sabha took place on December 17, 2002. During the debate, many legislators expressed respect for the judiciary but lamented how the judiciary treats the legislature, finding that this judicial activism risks harming the respect and power of the legislature.[239] In

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[235] *Id.* at 20–21.

[236] India, 13th Lok Sabha, *Combined Discussion on the Statutory Resolution Regarding Disapproval of Representation of the People (Amendment) Ordinance, 2002 and the Representation of the People (Amendment) Bill, 2002* (Dec. 17, 2002), at 2 [hereinafter *Lok Sabha Debate*] (statement of U. Cabinet Minister Ravi Shankar Prasad).

[237] *Lok Sabha Debate*, *supra* note 236, at 2 (statement of Mem. of Parl. Pawan Kumar Bansal). Section 33B of the ordinance watered down the disclosure requirements included in the May 2002 court order and, mirroring the subsequent legislation formalizing the ordinance, stated:

> Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election which is not required to be disclosed or furnished under this Act or the rules made thereunder.

Representation of the People (Amendment) Ordinance, § 33B (2002) (India).

[238] Ujjwal Kumar Singh, *India*, *in* ELECTORAL PROCESSES AND GOVERNANCE IN SOUTH ASIA 178, 188 (Dushyantha Mendis ed., 2007) (establishing that Lok Sabha, or House of the People, is the lower House of India's Parliament).

[239] *See, e.g.*, *Lok Sabha Debate*, *supra* note 236, at 3–5 (statement of Mem. of Parl. Priya Ranjan Dasmunsi)

> I have all regards for the Judiciary . . . [and] I am not questioning the *bona fide* of our judicial institutions, namely the Supreme Court of India . . . But in the last few years a tendency has

addition to these remarks, and despite the support behind the bill from the government, many legislators disagreed on the scope of the bill.[240] Member Priya Ranjan Dasmunsi, speaking for himself and on behalf of the Indian National Congress Party, disapproved of the bill because it did not go far enough to promote transparent elections.[241] In particular, Dasmunsi thought that in contrast to the proposed legislation wherein the required disclosures are to be made upon taking office, the disclosures should be required at the start of the election to "let the electorate know who I am."[242] He also contended the government's bill, did not actually promote electoral transparency.[243] Later in the debate, the Minister of Law and Justice, somewhat frustrated by Dasmuni's arguments, explained that a consensus was reached through informal deliberation in July and August with the political parties that the disclosures would occur post-election.[244]

In contrast to Dasmunsi, Member Somnath Chatterjee, representing the Communist Party of India, voiced support for the bill.[245] He disagreed with Dasmunsi's position that disclosures should be made before the election because corruption "comes

> developed on the part of the Judiciary to project to the nation as if the Parliament is not acting . . . Now, if this tendency on the part of the Judiciary is encouraged . . . then I am afraid the supremacy of the Parliament, the sanctity of the Parliament, the will of the people would be interfered with in a different chamber, which I feel is not a good thing to happen.;

Lok Sabha Debate, *supra* note 236, at 15 (statement of Mem. of Parl. Shri Somnath Chatterjee) ("[W]ith all my respect to the judiciary . . . and everybody who hold different opinions, which I also respect, but standing here I must assert the supremacy of the Parliament to legislate on behalf of the people. We cannot give this up.").

240 *Lok Sabha Debate, supra* note 236, at 3 (statement of Mem. of Parl. Priya Ranjan Dasmunsi).

241 *Lok Sabha Debate, supra* note 236, at 3–5 (statement of Mem. of Parl. Priya Ranjan Dasmunsi).

242 *Lok Sabha Debate, supra* note 236, at 2 (statement of Mem. of Parl. Priya Ranjan Dasmunsi).

243 *Lok Sabha Debate, supra* note 236, at 2 (statement of Mem. of Parl. Priya Ranjan Dasmunsi).

244 *See, Lok Sabha Debate*, *supra* note 236, at 26 (statement of Mem. of Parl. Priya Ranjan Dasmunsi).

245 *Lok Sabha Debate, supra* note 236, at 1 (statement of Mem. of Parl. Somnath Chatterjee).

after you are elected" and because it would unjustifiably prejudice voters against, for example, those without education, those who have been subject to frivolous lawsuits, and those with substantial assets.[246] Chatterjee reinforced his position by referring to the history of the Constituent Assembly, which explicitly rejected the idea of educational qualifications for office.[247] To deal with criminals running for office, he claimed that, instead of requiring disclosures at the start of elections, the various political parties should do their own research into candidates' backgrounds and pledge not to nominate any criminals.[248] Despite opposite positions, Chatterjee nonetheless exhibited respect for opposing views, acknowledging that others "are entitled to hold their view" and that "there can be always differences of opinions."[249]

After two hours of debate and further statements from multiple sides of the issue, the Deputy-Speaker of the Lok Sabha moved to vote on the bill and its amendments.[250] Member Pawan Kumar Bansal attempted to speak, but the Deputy-Speaker refused, stating that there was an agreed fixed time to discuss the bill and that time had passed.[251] Bansal complained that the Lok Sabha "should not rush through legislation like this," but his concerns went unanswered.[252] A vote was held, and the amendments were not approved, though the bill in its original form was approved.[253]

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246 *Lok Sabha Debate, supra* note 236, at 1 (statement of Mem. of Parl. Somnath Chatterjee). *See also Lok Sabha Debate, supra* note 236, at 2 (statement of Manda Jagannath) (establishing that Member Manda Jagannath, on behalf of the Telugu Desam Party, largely agreed with Chatterjee and announced support for the bill.)

247 *Lok Sabha Debate*, *supra* note 236, at 13 (statement of Mem. of Parl. Somnath Chatterjee).

248 *Lok Sabha Debate*, *supra* note 236, at 14 (statement of Mem. of Parl. Somnath Chatterjee).

249 *Lok Sabha Debate*, *supra* note 236, at 16 (statement of Mem. of Parl. Somnath Chatterjee).

250 *Lok Sabha Debate*, *supra* note 236, at 25.

251 *Lok Sabha Debate*, *supra* note 236, at 25 (statement of Mem. of Parl. Pawan Kumar Bansal).

252 *Lok Sabha Debate*, *supra* note 236, at 25 (statement of Mem. of Parl. Pawan Kumar Bansal).

253 *Lok Sabha Debate*, *supra* note 236, at 28–37.

Following approval by the Lok Sabha, the bill was sent to the Rajya Sabha.[254] Members of the Rajya Sabha debated the proposed bill on December 19, 2002.[255] The debate was of a similar quantity and quality as the debate in the Lok Sabha.[256] The debate lasted for over three hours and over fifteen members, given ten minutes each, spoke about their views on the issue.[257] Most of the remarks were substantive, introducing logic, information, and were in the same vein as the remarks made in the Lok Sabha. Following the debate, the Rajya Sabha approved the bill.[258] After the signature of the president, it became law.[259]

The most notable provision of the new law was Section 33B that declared "[n]otwithstanding anything contained in any judgment . . . of any court . . . no candidate shall be liable to disclose or furnish any such information . . . which is not required to be disclosed or furnished under this Act."[260] This provision nullified the requirements imposed by the Supreme Court and replaced them with new requirements, which differed in a few key respects from the requirements imposed by the Supreme Court.[261] One of the most important differences is that the final law required only disclosure of assets and liabilities after election.[262] In addition, under the new law, the candidates need

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254 The Rajya Sabha is the upper house of the Parliament of India. Dr. Yogendranarian, *The Upper House of Indian Parliament*, RAHYA SABHA (Feb. 2005), https://rajyasabha.nic.in/rsnew/practice_procedure/book1.asp.

255 *See* India, 197th Rajya Sabha, *Debate on Statutory Resolution Seeking Disapproval of the Representation of the People (Amendment) Ordinance, 2002 and The Representation of the People (Third Amendment) Bill, 2002* (Dec. 19, 2002), https://rsdebate.nic.in/bitstream/123456789/86666/1/PD_197_19122002_22_p206_p267_20.pdf [hereinafter *Rajya Sabha Debate*].

256 Compare *Lok Sabha Debate*, *supra* note 236, *and Rajya Sabha Debate*, *supra* note 255.

257 Compare *Lok Sabha Debate*, *supra* note 236, *and Rajya Sabha Debate*, *supra* note 255.

258 *Rajya Sabha Debate*, *supra* note 255, at 263–67.

259 *Passage of Legislative Proposals in Parliament*, LOK SABHA, http://loksabhaph.nic.in/Legislation/Legislation.aspx (last visited Nov. 13, 2021).

260 Representation of the People (Third) Amendment Act, 2002, No. 4 Acts of Parliament, 2002 (India).

261 See Singh, *supra* note 238, at 187–88 tbl.8.1 (providing a breakdown of the major differences between the Supreme Court requirements and the law passed by the legislature).

262 *See* Singh, *supra* note 238, at 196–97 tbl.8.1.

only disclose: (1) criminal convictions with a sentence of one year or more, (2) pending criminal cases with a possible sentence of at least two years, and (3) assets of the candidate and his or her family.[263] In contrast, the Supreme Court's order had required disclosures of education, liabilities, and criminal acquittals and convictions regardless of the sentence.[264]

Through another PIL, the Supreme Court was given a chance to review this new law. It found that Section 33B, which invalidated the court's initial requirements, was unconstitutional and thus void.[265] The Court declared that it has the right to review the legislation for compliance with constitutional principles and with prior guidance set out by the court, and thus Section 33B's blanket ban on the Court's prior order was impermissible.[266] The Court then analyzed the new law's requirements. It found that the new law's requirements for disclosure of assets and liabilities were not sufficient and that the EC must implement the conditions the Court had originally put forth, including that disclosures must be made at the time of filing the nomination.[267] The Court did, however, agree that the new law's removal of educational requirements and limitations on disclosure of criminal records was mostly acceptable.[268] The EC implemented the Court's order in April 2003 and the orders have governed subsequent elections.[269]

C. *United Kingdom*

The Human Rights Act of 1998 ("UK HRA") is the primary vehicle through which weak-form judicial review has been adopted in the U.K..[270] Coming into force on October 2, 2000, the UK HRA is a statutory bill of rights that incorporates most of the rights included in the European Convention on Human

263 Representation of the People (Third) Amendment Act, 2002, No. 4 Acts of Parliament, 2002 (India).

264 *See* Singh, *supra* note 238, at 196–97 tbl.8.1.

265 People's Union for Civil Liberties v. Union of India (2003) 2 S.C.R. 529.

266 *Id.* at 12–13.

267 *Id.* at 18.

268 *Id.* at 20.

269 Mate, *supra* note 221, at 195.

270 *See* UK HRA, *supra* note 85; *see infra* Part II C.

Rights (ECHR) and makes them enforceable in U.K. courts.[271] The Act binds courts and the executive to the rights contained in the ECHR but does not bind the Parliament.[272] Instead, the Act protects ECHR rights from parliamentary encroachment through Sections 3, 4, 10, and 19. First, Section 19 requires a Minister in charge of a bill to either make a statement declaring the bill's compatibility with ECHR rights or make a statement explaining that the Government nevertheless wishes to proceed with the bill absent a declaration of compatibility.[273] Second, Section 3 requires courts to interpret legislation "as far as it is possible" in a way that complies with ECHR rights.[274] If courts are unable to do this, they may use Section 4, which allows courts at the level of the High Court or higher to declare that legislation is incompatible with ECHR rights,[275] such a declaration of incompatibility (DOI) does not affect the continuing validity and enforcement of a statute and is not binding on parties in the case.[276] Lastly, under Section 10, the Government may enact remedial orders which can either (1) amend primary legislation, or (2) amend or repeal subordinate legislation, that was the subject of the DOI.[277] The Government and the legislature, however, are not required to act and may ignore the DOI.[278]

Although the Government and legislature have the power to ignore DOIs, the Government has adopted both a "policy of responding to all DOIs in some way" and a procedure through which to do so.[279] The Government established the Human Rights

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[271] UK HRA, *supra* note 85, at § 1 (UK), available at https://www.legislation.gov.uk/ukpga/1998/42/section/1.

[272] UK HRA, *supra* note 85, at § 6(3) (UK), available at https://www.legislation.gov.uk/ukpga/1998/42/section/6.

[273] UK HRA, *supra* note 85, at §§ 19(1)(a)–(b).

[274] UK HRA, *supra* note 85, at § 3(1).

[275] UK HRA, *supra* note 85, at §§ 4(2), (5).

[276] UK HRA, *supra* note 85, at § 6.

[277] UK HRA, *supra* note 85, at §§ 10(2)–(3). Remedial orders can be made either through the normal legislative procedure of a vote in both Houses of Parliament, or, in "urgent cases," without a vote. UK HRA, *supra* note 85, at sched. 2. If an urgent remedial order is in effect but both Houses do not approve of it by vote within 120 days, the urgent remedial order lapses. UK HRA, *supra* note 85, at sched. 2.

[278] UK HRA, *supra* note 85, at §§ 10(2)–(3) (UK), available at https://www.legislation.gov.uk/ukpga/1998/42/section/10

[279] SATHANAPALLY, *supra* note 5, at 148.

Unit of the Ministry of Justice and charged it with litigating all DOIs and communicating with the Joint Committee on Human Rights (JCHR), a committee drawn from both Houses of Parliament tasked with handling issues of human rights.[280] The JCHR, in turn, communicates these issues to the broader legislature and is responsible for drafting remedial orders.[281] Having outlined the particular mechanisms of weak-form judicial review in the U.K., parliamentary engagement with two declarations of incompatibility, *R (on the application of Morris) v Westminster City Council* and *R (Thompson & JF) v Secretary of State for the Home Department*, will now be analyzed.

1. Social Housing Entitlement

Under the U.K.'s Housing Act of 1996, British citizens who are homeless are entitled to housing assistance.[282] In addition, priority for assistance is given to those who, inter alia, are pregnant or reside with dependent children.[283] Section 185(4) of the Act, however, also provides that "a person from abroad who is not eligible for housing assistance shall be disregarded in determining . . . whether a person . . . has a priority need for accommodation."[284] As a result, a homeless single mother with British citizenship by descent, whose child was not eligible for housing assistance because the child was not a British citizen, was determined not to have a priority need.[285] This mother brought suit claiming that Section 185(4) violated Section 14 of the ECHR, which prohibits discrimination on the basis of national origin.[286] The England and Wales Court of Appeals found that Section 185(4) was disproportionate to the U.K.'s goal of preventing "benefit tourism" and thus declared Section 185(4) incompatible with the ECHR prohibition of discrimination based

280 SATHANAPALLY, *supra* note 5, at 135–36.

281 SATHANAPALLY, *supra* note 5, at 159–62.

282 Housing Act 1996, c. 7 (Eng. & Wales).

283 *Id.* § 189.

284 *Id.* § 185(4).

285 R. (on the application of Morris) v. Westminster City Council (No. 3) [2005] EWCA Civ. 1184, [1].

286 *Id.* at [4]–[5].

on national origin.[287]

Five months after the DOI, on March 2, 2006, the JHCR informed the Government they did not intend to appeal the decision and that the Secretary of State is in the process of determining "how to remedy the incompatibility."[288] On April 20, 2006, the Government informed the JHCR that it had not yet decided whether to repeal or amend Section 185(4) and that the Government needed to consult with other Government departments.[289] After not hearing from the Government, the JHCR reached out to the Government on January 23, 2007, asking if the Government intended to propose a remedy.[290] On February 27, 2007, the Government responded, noting that it was "very difficult to identify a compatible solution that will continue to deliver the Government's policy on access to social housing."[291] Then, on April 13, 2007, the Government wrote the JCHR reporting that the Government intended to propose an amendment placing housing authorities under "a new interim duty to secure accommodation for the applicant and all household members for a temporary period in order to give them an opportunity to regularise their immigration status."[292] The JHCR voiced a concern that this amendment would not remedy the incompatibility.[293] The Government then withdrew this proposal and indicated that the issue was being

[287] R. (on the application of Morris) v. Westminster City Council (No. 3) [2005] EWCA Civ. 1184, [45]–[48]. A second case dealing with a British husband with a non-British pregnant wife, reached the same conclusion and also issued a DOI; *see also* R (on the application of Gabaj) v. First Secretary of State (unreported) 28 Mar. 2006 (Administrative Court).

[288] Letter from Alan Edwards, Homeless and Hous. Support, Off. of the Deputy PM, to the Joint Comm. on Hum. Rts. (Mar. 2, 2006) (on file with Joint Comm. Hum. Rts).

[289] J. COMM. HUM. RTS, HL 128/HC 728, SIXTEENTH REPORT OF SESSION 2006-07: MONITORING THE GOVERNMENT'S RESPONSE TO COURT JUDGMENTS FINDING BREACHES OF HUMAN RIGHTS 44 (2007).

[290] *Id.*

[291] *Id.* at 44–45 (quoting letter from Yvette Cooper, Member of Parliament, Minister for Housing and Planning, Dep't for Cmtys. and Local Gov't, to Joint Comm. Hum. Rts. (Feb. 27, 2007) (on file with Joint Comm. Hum. Rts.).

[292] *Id.* at 45–46 (quoting letter from Yvette Cooper, Member of Parliament, Minister for Housing and Planning, Dep't for Cmtys. and Local Gov't, to Joint Comm. Hum. Rts (Apr. 13, 2007) (on file with Joint Comm. Hum. Rts).

[293] *Id.* at 46.

reexamined.[294]

On January 24, 2008, MP Andrew Love, noting the Government's lack of response to the DOI and the importance of stopping the discrimination, brought an amendment that would directly repeal Section 184(5).[295] Under-Secretary for the Department of Communities and Local Government, Iain Wright, responded that "simply repealing Section 184(5) is not the answer" and reassured MP Love that the Government is dealing with the issue and "will introduce a remedy as soon as [it] can."[296] With this reassurance, MP Love withdrew his amendment.[297] The Government, however, failed to introduce a remedy, and in an April 2008 report, the JCHR again noted its disappointment.[298] In particular, the JCHR stated that they were "concerned at the time which the Government has taken to reach a settled policy on this issue" and that "[i]f the Government intends to allow the incompatibility to stand … it should make their position clear."[299] In addition, the JCHR proposed its own amendment repealing Section 185(4).[300]

Finally, in June 2008, almost three years after the initial DOI, the Government introduced amendments aimed at remedying the incompatibility during the Housing and Regeneration Bill's Committee stage in the House of Lords.[301] The Government only provided one day's notice of the proposed amendments to the JCHR, and thus the JCHR did not have time to adequately respond.[302] The amendments did not repeal the provision but instead provided that when non-British dependents were counted in the priority analysis, the housing authorities would only have to arrange for private, not public, rented

294 J. COMM. HUM. RTS, HL 95/HC 501, SEVENTEENTH REPORT OF SESSION 2007-08: LEGISLATIVE SCRUTINY: 1) EMPLOYMENT BILL; 2) HOUSING AND REGENERATION BILL; 3) OTHER BILLS 24 (2008) [hereinafter JCHR 17TH HOUSING REPORT].

295 Jan. 24, 2008, Public Bill Committee, Hansard HC cols. 521–22.

296 *Id.* cols. 522–23.

297 *Id.*

298 *Id.*

299 JCHR 17TH HOUSING REPORT, *supra* note 294, at 24.

300 JCHR 17TH HOUSING REPORT, *supra* note 294, at 24.

301 J. COMM. HUM. RTS, HL 173/HC 1078, THIRTY-FIRST REPORT OF SESSION 2007–08: MONITORING THE GOV'T'S RESPONSE TO HUM RTS JUDGMENTS: ANNUAL REPORT 36 (2008) [hereinafter JCHR 31ST HOUSING REPORT].

302 *See* JCHR 31ST HOUSING REPORT, *supra* note 301, at 36.

accommodation for one year.[303]

Notably, several legislators prodded the Government on the amendments. In a House of Lords debate on July 9, 2008, the Earl of Onslow noted that the Government's amendments seem "to several of us to continue to be discriminatory" because families with mixed nationalities would not be "on a par with someone whose entire family had completely normal immigrant status."[304] He further noted that it is "liable to fall foul of the lawyer and the courts" and that it warrants "serious consideration."[305] After a lengthy response from the Minister on why the Government believes it strikes the right balance, the Earl withdrew his amendment.[306]

After approval by the House of Lords and on return to the House of Commons, the amendments received attention from some MPs. Several MPs mentioned their concern about how the amendments were still discriminatory because by restricting the provision of accommodation to "private rented accommodation," they were increasing the cost of accepting the offered accommodation, potentially reducing the ability of those homeless people to actually accept the offer.[307] In response to these concerns, the Minister simply noted that the amendments "strike a fair balance between the rights of migrants who come to this country with no claim to public funds and the interests of UK taxpayers" and that he would "look into" the concerns mentioned by the MPs.[308]

Unfortunately, the overall discussion was quite limited due to the size of the bill that the amendments were a part of and the limited time frame in which it was considered. Several MPs lamented this fact; for example, stating that "having 717 amendments to the [b]ill since Second Reading does not make for particularly good scrutiny" and noting that they felt some "frustration" in not being able to "consider the amendments . . .

303 *See* JCHR 31ST HOUSING REPORT, *supra* note 301, at 36–37.

304 703 PARL. DEB HL (2008) col. 815–16 (statement of The Earl of Onslow).

305 *Id.*

306 *Id.* at col. 821.

307 479 Parl Deb HC (2008) (UK) cols. 611–12.

308 *Id.* at col. 612 (statement of Mem. of Parl. Iain Wright).

in detail."[309] They similarly mentioned their displeasure with the time it took for the Government to respond to the DOI and with the substantive problems of the Government's amendments.[310] For example, one MP claimed that "the proposal is sticking plaster; it is not a panacea."[311] Nevertheless, the House of Commons approved the bill, and the Housing and Regeneration Act 2008 became law after receiving royal assent.

In the JCHR's report after the passage of the Housing and Regeneration Act 2008, they reasserted their concerns over the new provisions. They claimed that although the provisions remedied the clear incompatibility declared by the courts, the new provisions might still be incompatible.[312] The JCHR based this view on the fact that although the Government justified the continued distinction ("resources available for long term social housing"), the Government had not explained why the means taken to advance this justification were proportional to the continued distinction based on national origin.[313] As a result, the new provisions did not "entirely remove the risk that [the] domestic courts, or the ECtHR, will find a further violation of the right to enjoy respect for private and family life without unjustified discrimination."[314]

2. Sex Offender Registration

Under Sections 82, 83, and 86 of the Sexual Offences Act of 2003, anyone who is convicted of a sexual offense and sentenced to more than 30 months in prison has a duty, upon release from prison, to notify the police of where they live and where they travel abroad.[315] This notification requirement persists for the rest of their lives, and there is no provision in the Sexual Offenses Act upon which to challenge the notification

309 *Id.* at cols. 614–15 (statements of Mem. of Parl. Stewart Jackson and Mem. of Parl. Lembit Öpik).

310 *Id.*

311 *Id.* at col. 614 (statement of Mem. of Parl. Stewart Jackson).

312 JCHR 31ST HOUSING REPORT, *supra* note 301, at 38–39.

313 JCHR 31ST HOUSING REPORT, *supra* note 301, at 38–39.

314 JCHR 31ST HOUSING REPORT, *supra* note 301, at 39.

315 Sexual Offences Act 2003, c. 42, §§ 82, 83, 86 (Eng. & Wales).

requirement.[316] Two suits were brought in court that claimed that the indefinite notification provision was a disproportionate impediment of the right to respect privacy under Article 8 of the ECHR.[317] The lower court agreed and issued a DOI.[318] The Government publicly disagreed with the ruling and appealed the case to the Supreme Court which, on April 21, 2010, affirmed the lower court's ruling.[319]

On February 16, 2011, the House of Commons debated the court decision.[320] The Secretary of State for the Home Department, Theresa May, spoke on behalf of the Government.[321] She noted that the Government was "disappointed and appalled by that ruling" and that it would "make the minimum possible changes to the law in order to comply with the ruling."[322] In the following question-and-answer period, MP Jack Straw pressed May on the available Government responses.[323] In particular, he noted that "there is absolutely no obligation . . . to change the law one bit" and that "[i]t would be entirely lawful . . . to say that the existing regime will continue without any amendment."[324] In response, May simply remarked that "Parliament will have the final decision on what happens."[325] When pressed again on the issue by MP Barry Gardiner, May responded that the Government has "no further right of appeal" and that it is introducing "a tough set of measures that will address the issue."[326] In other answers, she also noted that the Government "do[es] have to make a change" and that legislation keeps getting

316 *See id.*

317 F & Anor, R (on the application of) v. Secretary of State for the Home Department [2008] EWHC 3170 (QB).

318 *Id.*

319 *See* R (on the application of F (by his litigation friend F)) and Thompson (FC) v. Sec'y of State for the Home Dept. [2010] UKSC 17, [58]; s*ee* SATHANAPALLY, *supra* note 5, at 215 (noting that even Prime Minister David Cameron publicly stated that the ruling "[flies] completely in the face of common sense.").

320 523 Parl Deb HC (6th ser.) (2011) col. 959.

321 *Id.*

322 *Id.* (statement of Sec'y of St. for the Home Dept. Theresa May).

323 *Id.* at col. 963 (statement of Mem. of Parl. Jack Straw).

324 *Id.* (statement of Mem. of Parl. Jack Straw).

325 523 Parl Deb HC (6th ser.) (2011) col. 963 (statement of Sec'y of St. for the Home Dept. Theresa May).

326 *Id.* at col. 967 (statement of Sec'y of St. for the Home Dept. Theresa May).

"overturned" by the courts.[327]

Despite these two instances, most of the debate consisted of MPs complaining about the decision and asserting that the courts continuously put the "rights of bad people over the rights of good people" and that "if one offender gets off the sex offenders register, it is one too many."[328] The Government agreed, restating that despite the plan to comply minimally with the decision, further amendments would be made to the sexual offense register to make it tougher.[329] One minor exception was when MP Peter Lilley mentioned that there "is some merit in the Court's decision."[330] May responded, however, simply by noting the widespread concern about a court making "a judgment that puts the right of a perpetrator above the rights of the public and individuals victims."[331] No mention was made as to the judicial reasoning behind the Court's decision or to the fact that the rights of the public are not put below the rights of the perpetrator if the perpetrator is not a risk to society.

Following this debate, on June 14, 2011, the Government introduced a remedial order addressing the DOI.[332] The draft remedial order allowed convicted sex offenders to petition the police to be removed from the register fifteen years after completing his or her sentence.[333] The JCHR then released their report on the draft order stating the belief that the draft order would not sufficiently remedy the incompatibility.[334] In particular, the JCHR compared the draft procedure to the procedures of other EU countries and noted that the court emphasized the importance of "review by an independent and

327 *Id.* cols. 961, 969 (statements of Sec'y of St. for the Home Dept. Theresa May).

328 *Id.* col. 969 (statement of Mem. of Parl. Philip Hollobone); *id.* col. 965 (statement of Mem. of Parl. Ian Paisley).

329 523 Parl Deb HC (6th ser.) (2011) col. 962 (statement of Sec'y of St, for the Home Dept. Theresa May Theresa May).

330 *Id.* col. 962 (statement of Mem. of Parl. Peter Lilley).

331 *Id.* cols. 962–63 (statement of Sec'y of St, for the Home Dept. Theresa May).

332 529 Parl Deb HC (6th Ser.) (2011) (written statement of Under-Sec'y of St. of Home Dept. Lynne Featherstone).

333 *Id.*

334 J. COMM. HUM. RTS, HL 200/HC 1549, NINETEENTH REP. OF SESSION 2010-12: PROPOSAL FOR THE SEXUAL OFFENCES ACT 2003 (REMEDIAL) ORDER 2011 (2011).

impartial body."[335] The JCHR concluded that review by the police would not be an "appropriate tribunal" and recommended that the draft order be revised to provide for review by a high court, or that the review by the police be appealable to the high courts.[336] In addition, the JCHR noted that the remedial order should make clear that the review should strike a balance between the risk to the public and the restriction on the right to privacy.[337]

The JCHR also discussed procedural concerns they had with the Government's handling of the issue. In particular, the JCHR noted that the remedial order process was designed to be a procedure through which the Government can quickly remedy a breach of a right and that the Government abused this process by introducing a draft that would not remove the incompatibility.[338] They also disapproved of a "number of potentially misleading statements [that] have been made in the press about the scope of this judgment," and that the Court's decision did not put the rights of sex offenders above the public, but merely required that the offenders allowed to have their situation reviewed and conduct a balancing test.[339]

After considering this report, the Government introduced a revised version of the remedial order on March 5, 2012.[340] The revised order provided for review by the police and appeal to a magistrate court.[341] The Government stated that it did not agree with the JCHR's interpretation that the decision required review by courts "because the court was not addressing the issue of the nature of the decision maker but whether it is possible to make a reliable assessment of the risk of a person committing a further sexual offence."[342] The JCHR's response acknowledged that the second draft remedial order did remove the incompatibility but

335 *Id.* at 14–15.

336 *Id.* at 15–16.

337 *Id.* at 17–19.

338 *Id.* at 24.

339 *Id.* at 12–13.

340 *See* SEC'Y ST, HOME DEP'T, THE GOV'T RESPONSE TO THE NINETEENTH REPORT OF THE J. COMM. HUM. RTS SESSION 2010-12: PROPOSAL FOR THE SEXUAL OFFENCES ACT 2003 (REMEDIAL) ORDER 2011 (Mar. 5, 2012) (UK).

341 *Id.* at 1.

342 *Id.* at 3.

stated that there might now need to be an additional enhanced review because concurrent amendments to the Sexual Offences Act made the registration requirement more onerous in other aspects.[343]

Despite this finding, the House of Commons approved the remedial order without debate on June 27, 2012, by a vote of 290-to-197.[344] Following this approval, the remedial order went to the House of Lords, where they debated for approximately one hour.[345] During that hour, most of the debate again centered around whether the Government's response was sufficient in protecting the public.[346] Baroness Smith of Basildon noted that in passing such legislation, "[t]here are three things to look at—the costs, the benefit, and the risk."[347] She focused on these aspects in her critique of the Government's response but did not debate whether the Court was correct and whether the Government should respond.[348] Importantly, she did not expressly suggest an alternative but merely stated that she "would like the Government to go away and think about the alternatives."[349] One exception was Baroness Hamwee of Richmond Upon Thames, who stated that it seemed to be a basic right that an offender gets a hearing and mentioned her concern with how long it has taken to pass a remedial order.[350] She also announced her disagreement with the JCHR, particularly that she was "uneasy" about offenders having to wait fifteen years for a review and that such a "serious matter" should go to a higher court than a magistrate's court.[351] Baron Lester of Herne Hill responded on behalf of the JCHR, defending the process and explaining that the JCHR "influenced the [G]overnment in reshaping the order" and that the process demonstrates the

343 J. COMM. HUM. RTS, FIRST REPORT OF SESSION 2012–13: DRAFT SEXUAL OFFENCES ACT 2003 (REMEDIAL) ORDER 2012: SECOND REPORT 3–4 (2012) (UK).

344 5547 Parl Deb HC (6th ser.) (2012) col. 379 (UK).

345 738 Parl Deb HL (5th ser.) (2012) cols. 885–86 (UK).

346 *See id.*

347 *Id.* col. 880 (statement of B. Smith of Basildon).

348 *Id.* (statement of B. Smith of Basildon).

349 *Id.* col. 881 (statement of B. Smith of Basildon).

350 738 Parl Deb HL (5th ser.) (2012) cols. 883–84 (UK) (statement of B. Hamwee of Richmond Upon Thames).

351 *Id.* col. 884 (statement of B. Hamwee of Richmond Upon Thames).

success of the Human Rights Act in creating beneficial "parliamentary procedure."[352] Despite this, Lord Lester acknowledged that the Government's proposal was "widely read."[353] He then proposed to end the debate because the Government and the JCHR "dealt with [the issue] satisfactorily."[354] The remedial order was then agreed to and became effective on July 5, 2012.

3. Transgender Discrimination and Terrorist Detention

Despite the importance of these two case studies from the U.K., it is important to situate them within the broader U.K. history of declarations of incompatibility. From the enactment of the UK HRA to July 2017, twenty-five DOIs have become final.[355] Of these twenty-five DOIs, sixteen have been remedied by legislation (either before or after the final judgment), and three have been remedied by a remedial order.[356] The remaining six were still under consideration by the Government as of July 2017.[357] Importantly, the Government has never stated that it disagrees with the court's decision and did not remedy the incompatibility.[358] In addition, the level of debate in these two case studies appears to be the exception rather than the rule. For example, Sathanapally found that between the enactment of the UK HRA and 2010, "parliamentary debates in both Houses demonstrate very little discussion of DOIs, and, in most cases, little deliberation on reply legislation."[359] Sathanapally does, however, provide two examples of instances where there was legislative debate.

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352 738 Parl Deb HL (5th ser.) (2012) cols. 885–86 (UK) (statement of B. Lester of Herne Hill).

353 *Id.* col. 886.

354 *Id.*

355 MINISTRY OF J., RESPONDING TO HUM. RTS JUDGMENTS: REPORT TO THE JCHR ON THE GOV'T'S RESPONSE TO HUM. RTS JUDGMENTS, 2017, Cm. 9535, at 32 (UK).

356 *Id.*

357 *Id.*

358 *See id.*

359 SATHANAPALLY, *supra* note 5, at 138–39 (finding an especially pronounced dearth of legislative debate in the early years of the UK HRA between 2000 and 2004).

First, in *Bellinger*, a case involving discrimination against a transgender individual, Sathanapally finds there was a "careful and deliberate process of legislation" and the "legislative debates . . . evidence an independent political deliberation on the protection of rights."[360] This case, however, is not a compelling example of weak-form judicial review sparking legislative engagement because it was not necessarily prompted by a decision from a U.K. court. Instead, the Government had "announced its intention to legislate to recognize the rights of transsexuals" before the U.K. court's judgments, and the U.K. Government had been warned by the ECHR, beginning approximately ten years before the U.K.'s House of Lords Court's decision, that its policy on transgender individuals was problematic.[361] As a result, the legislative deliberation regarding transgender individuals does not appear to have been triggered by weak-form judicial review and thus is not a great example in support of the dialogic benefit of weak-form judicial review.

Second, Sathanapally discusses the case of *Belmarsh Prisoners* and mentions that it had the "highest public profile" of all DOIs issued between 2000 and 2010.[362] The DOI declared that an executive order that allows for the detention of terrorist suspects without trial was incompatible with the right to life and liberty found in Article 5 of the ECHR.[363] Although there was a rather substantive debate in Parliament regarding legislative responses to the DOI, the case should be taken with a grain of salt when considering legislative engagement in models of weak-form judicial review. For one, the case was regarding the rights of foreign terrorist suspects in the wake of 9/11, a particularly provoking issue, and thus a clear outlier. Second, although the legislative debate was substantive, it was also relatively constrained. Notably, the "[G]overnment exercised its powers to control the legislative process in the House of Commons" and shepherded the complex legislation through Parliament in less

360 SATHANAPALLY, *supra* note 5, at 166, 169.

361 SATHANAPALLY, *supra* note 5, at 166.

362 SATHANAPALLY, *supra* note 5, at 189.

363 A (and others) v. Sec'y St, Home Dep't, [2004] UKHL 56, 49 House of Lords.

than three weeks.[364]

V. COMPARISONS: DIALOGUE OF THE DEAF

Before reaching the conclusions of the case studies, it is important to again mention the shortcoming of the analysis of legislative engagement. The comparison performed in this article only analyzed one model of weak-form judicial review, the U.K., and so to reach more fruitful conclusions, comparisons with other models of weak-form judicial review must also be performed. Also, as previously mentioned, any analysis of legislative engagement and debate is necessarily limited due to factors inherent in legislatures and political systems. Despite this, there are several important lessons about the level of legislative engagement in weak-form versus strong-form models of judicial review to be gleaned from the various case studies.

First, it is important to note several similarities between the legislative engagement in both models. Legislatures in both models seem to show respect for the decision of the court, even if there is disagreement. In all three of the countries analyzed, legislators, when discussing their disagreement with their respective Supreme Courts, would nonetheless mention how they have a great deal of respect for the Court. Although this was less apparent for incredibly controversial political issues such as campaign finance in the U.S., there was nevertheless a baseline of respect shown. Despite the constant struggle between the Court and the legislature for supremacy, even in India, legislators showed respect for the court,

Additionally, in both systems of strong- and weak-form judicial review, the legislative debate seems to add to the conversation by bringing up important political and moral arguments that can inform judicial decisions. The response to *U.S. v. Stevens*, for example, included congressional findings that the production of animal crush videos is obscene and lacks value. These congressional findings provided useful political and moral arguments in the law.[365] In the U.K., the inclusion of political and moral arguments in the debate about the shaping of law can

364 SATHANAPALLY, *supra* note 5, at 196.

365 *See Stevens*, 130 S. Ct. 1577, 1579 (2010) (discussing the legislative history and intent behind the legislation).

be seen in the response to *Thompson* in the House of Lords, where Baroness Smith of Basildon noted the explicit political costs and risks associated with the remedial order.[366] One interesting point, however, is that the legislative response including moral and political arguments into the debate in the wake of a court decision is not limited to systems of weak-form review, but also seems to occur in strong-form systems such as the U.S. Similarly, both systems of weak- and strong-form judicial review seem to allow for the correction of legislative blind-spots. In the U.S., for example, this is evident from Senator Sessions' statement that the court's decision in *Citizens United* showed "how far some congressionally passed laws reach" and "that sometimes these bills reach farther than [Congress] intended."[367] Again, however, this appears to be a benefit of judicial review regardless of whether it is strong- or weak-form.

More important to the conclusion of this article, however, are the differences between legislative engagement in weak- and strong-form models of judicial review. In models of weak-form judicial review, as in the U.K., there is rarely any legislative debate about the possible responses to a DOI. When there is legislative debate, the quantity and quality of this engagement seem to be rather limited. Although there have been instances of legislative engagement, this seems to be the exception rather than the rule. Indeed, even on highly controversial issues, the legislative debate was constrained by the Government and the legislative process. For example, in the debate over social housing entitlement, the provision that remedied the incompatibility was an amendment buried deep within a complex bill. This method of remedying a DOI limits the ability of the Parliament to substantively debate the issue because they do not have time to discuss every aspect of a large bill. Similarly, because the Government controls the legislative process, it can shepherd bills through Parliament quickly, occasionally without significant debate, as was the case with the legislative response to *Belmarsh Prisoners*. In contrast, the debate in strong-form models of judicial review might be more substantial, as

366 *See* 738 Parl Deb HL (5th ser.) (2012) cols. 880-81 (UK).

367 111 CONG. REC. S108-09 (daily ed. Jan. 21, 2010) (statement of Sen. Jeff Sessions).

demonstrated by the case studies of India and the U.S. Although the legislative process seems to nevertheless constrain the debate in models of strong-form judicial review, it might be less constrained than in models of weak-form judicial review.

In the case studies presented here, even when the legislature in systems of weak-form judicial review does debate the issue, there was little to no reference or mention of judicial reasoning. In all examples of legislative engagement in the U.K., the legislators merely seem to be complaining that the court is wrong, but they do not provide reasoning as to why. For example, in the legislative engagement after *Thompson*, legislators simply mentioned that the court put the interests of sex offenders over the safety of the public. While the legislators are entitled to that opinion, it does not engage the judicial decision in a way that can promote a meaningful dialogue. In the models of strong-form judicial review analyzed here, the picture is somewhat better. Although most legislators were merely venting and simply mentioned their disagreement with the courts, there were some notable exceptions. For example, in the wake of *Citizens United*, several legislators discussed constitutional reasoning by discussing how the judicial opinion stands in contrast to the intentions of the Founding Fathers.[368] Similarly, in India, the legislators discussed judicial reasoning in their debate over the requirements of election disclosures. For example, one legislator discussed how the court was wrong to require financial disclosure before the election because this does not promote anti-corruption, believing that corruption can only occur while in office.[369] Another legislator discussed, similar to the invocation of the Founding Fathers in the *Citizens United* debate, that the Indian Constituent Assembly had explicitly rejected the idea of educational prerequisites to running for office and that the judicial opinion flies in the face of this historical fact.[370] This sort of engagement with judicial reasoning

368 *See, e.g.*, 111 CONG. REC. S108-09 (daily ed. Jan. 21, 2010) (statement of Sen. Jeff Sessions); 111 CONG. REC. S354–55 (daily ed. Jan. 29, 2010) (statement of Sen. Sheldon Whitehouse).

369 *Lok Sabha Debate, supra* note 236, at 1 (statement of Mem. of Parl. Somnath Chatterjee) (noting that disclosures should not be required before the election because corruption only "comes after you are elected").

370 *Lok Sabha Debate*, *supra* note 236, at 13 (statement of Mem. of Parl.

done by the legislature is the sort of substantive analysis that the legislature must do to generate meaningful dialogue between the branches of government.

In the rare instances that judicial reasoning was invoked in the legislative engagement in the U.K., it seemed to concern whether the remedying legislation will comply with the court's decision and be upheld in subsequent judicial review. This is evident from the JCHR's reports on the legislative proposals by the Government in the wake of *Thompson*. The JCHR reasoned that because the Court focused on the need for an independent tribunal, allowing the police to decide the issue without the possibility of judicial review was likely to not fully remedy the incompatibility. Much legislative engagement in the U.S. was also about whether remedial legislation would hold up during another round of judicial review. This is apparent from the legislative engagement in the wake of *U.S. v. Stevens* when legislators spent time at hearings trying to figure out how to tailor their response to fit within the bounds of the court decision and to close the "loopholes" that would render the legislation overbroad.[371]

Similarly, in the U.K., there is not a willingness on the part of Parliament or the Government to blatantly disregard a DOI. When prodded on the possibility that Parliament does not necessarily need to remedy the incompatibility, Theresa May simply remarked that the Government had exhausted its appeals and that the responsive legislation is a tough measure that will remedy the issue.[372] Similarly, in the legislative response to the DOI regarding social housing entitlement, even though it was apparent that the Government did not agree with the decision, it simply refused to act for multiple years before finally being pressured into passing a remedy instead of remedying the incompatibility. In contrast, despite the finality of judicial review in both India and the U.S., there does appear to be more of a

Somnath Chatterjee).

[371] *See, e.g.*, *United States v. Stevens: The Supreme Court's Decisions Invalidating the Crush Video Statute: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. at 24–25 (2010) (statement of Rep. Louie Gohmert).

[372] 523 Parl Deb HC (6th ser.) (2011) col. 967 (UK) (statement of Sec'y of St. for the Home Dept. Theresa May).

willingness to challenge Court decisions. For example, after *Citizens United*, there have been several proposed constitutional amendments that would explicitly reverse the Court's decision.[373] In addition, legislators in the U.S. seem to implicitly acknowledge that they can participate in the constitutional debate with means other than a constitutional amendment. For example, in the wake of *Citizens United*, legislators attempted to pass multiple pieces of legislation that would have implemented the restrictions in place before *Citizens United*, despite the Court's decision.[374] In India, the legislation that was passed, despite eventually being partially overturned by the court in a subsequent round of judicial review, explicitly repealed the court's decision.[375]

Lastly, the legislative engagement in the U.K. seems to rely almost entirely on the JCHR. For example, in the legislative response to *Thompson*, it was quite apparent that the remedial order had not been "widely read."[376] Nevertheless, the order was approved because the JCHR had gone through an iterative process with the Government and had given the order its official stamp of approval. Although it is useful to have legislative engagement in a committee setting, it risks curtailing a broader parliamentary debate. This is problematic because it prevents the legislature from fully engaging on the merits of the judicial decision and detracts from the democratic legitimacy argument often advanced in support of weak-form judicial review.

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[373] Drew Desilver, *Proposed Amendments to the U.S. Constitution Seldom Go Anywhere*, PEW RESEARCH CENTER, (Apr. 12, 2018), https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/; *see also* Andrew Prokop, *The Constitutional Amendment That Would Overturn Citizens United, Explained*, VOX (Sept. 11, 2014), https://www.vox.com/2014/9/11/6131163/citizens-united-constitutional-amendment-explained.

[374] *See e.g.*, Citizens United v. F.E.C., 130 S. Ct. 876, 895–96 (2010).

[375] Representation of the People (Third) Amendment Act, 2002, Section 33B, No. 4 Acts of Parliament, 2002 (India) (*repealed in part by* People's Union for Civil Liberties v. Union of India (2003) 2 S.C.R. 529). Section 33B explicitly stated "Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election which is not required to be disclosed or furnished under this Act or the rules made thereunder." *Id.*

[376] *See* 738 Parl Deb HL (5th ser.) (2012) cols. 885–86 (UK).

VI. CONCLUSION

In sum, the case studies presented here challenge our assumptions about the benefits of weak-form judicial review because they demonstrate that legislative engagement in models of weak-form judicial review might be lacking. In the U.K., although there is occasionally parliamentary debate and the JCHR does an excellent job in assessing remedial legislation in the wake of DOIs, the parliamentary debate is limited in quality and quantity. Instead of being willing to blatantly challenge judicial decisions, the debate within the legislature focuses mainly on how to comply with the judicial decision. Where there is disagreement, it is not publicly voiced. Instead, the Parliament will try to subvert the decision by delaying its response to the decision or by implementing an order that, although it claims remedies the incompatibility, does not, in fact, do so. In contrast, the legislative engagement in models of strong-form judicial review might be somewhat more substantial with legislators occasionally using judicial reasoning to assess judicial decisions and willing to expressly challenge the validity of court decisions. This demonstrates that it is possible to have a constitutional dialogue even in models of strong-form judicial review. Further research into the normative reasons for this difference is warranted. For this article's purposes, however, it is sufficient to note that in analyzing whether there is a meaningful dialogue between the court and the legislature, one must not simply look at how often courts strike down legislation or how often legislatures override court decisions; instead, the analysis must also include whether each party is performing its own independent institutional duties of constitutional interpretation during their part of the dialogue.